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Supreme Court, U. S.
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No. .

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

SOUTH SHORE HOSPITAL,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

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December 8, 1980

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Questions Presented.

1. Whether a National Labor Relations Board order purportedly designed to remedy discrimination proscribed by § 8(a)(3) of the National Labor Relations Act, but which in effect requires an employer to make a concession demanded by a union in collective bargaining negotiations, is authorized by the Act.

2. Whether an employer's refusal to accede to a union's negotiating demand for a retroactive wage increase for bargaining unit employees, equal to that previously granted non-unit employees, violates § 8(a)(3) of the National Labor Relations Act, where the sole evidence of unlawful motivation is the employer's contemporaneous refusal to bargain in good faith.

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NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit.

Petitioner South Shore Hospital prays that a writ of certiorari issue to review the decree of the United States Court of Appeals for the First Circuit in this case.

Opinions Below.

The opinion of the Court of Appeals is not yet officially reported, and appears at pp. 1a-13a of the Appendix. The decision and order of the National Labor Relations Board is reported at 245 NLRB No. 110 and appears at pp. 14a-74a of the Appendix.

Jurisdiction.

The decree of the Court of Appeals was entered on September 18, 1980, and appears at p. 75a of the Appendix. On October 7, 1980, the Court of Appeals stayed the operation of its decree until November 7, 1980, and on November 3, extended the stay to December 8, 1980, on condition that this petition be filed no later than that date, and that the Court of Appeals be notified promptly of the filing. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Statutes Involved.

Section 7 of the National Labor Relations Act ("the Act"), 29 U.S.C. § 157, provides, in pertinent part:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . .

Section 8(a) of the Act, 29 U.S.C. § 158(a), provides, in pertinent part:

> It shall be an unfair labor practice for an employer —
>
> . . . . . .
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
>
> . . . . . .
>
> (5) to refuse to bargain collectively with the representatives of his employees . . .

Section 8(d) of the Act, 29 U.S.C. § 158(d), provides, in pertinent part:

> For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement . . . but such obligation does not compel either party to agree to a proposal or require the making of a concession . . .

Section 10(c) of the Act, 29 U.S.C. § 160(c), provides, in pertinent part:

> If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any . . .

> unfair labor practice, then the Board shall state its findings of fact and shall issue and cause to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act . . .

Statement of the Case.

This petition seeks review of a decree enforcing a decision by the National Labor Relations Board ("the Board") that petitioner South Shore Hospital ("the Hospital") violated § 8(a)(3) of the Act by declining to agree to a demand by the Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO ("the Union"), for a retroactive wage increase for employees in the collective bargaining unit equal to that previously granted to nonunit employees, and of the Board's order that the Hospital make unit employees whole for any monetary losses incurred by reason of that violation.

This case arose out of negotiations between the Hospital and the Union over a contract covering a unit of technical employees. The technical workers, who have been represented by the Union since 1974, were at all times relevant to this proceeding the only Hospital employees represented by a labor organization. Twenty-one bargaining sessions were held between July, 1977 and April, 1978, but no agreement was reached to succeed the contract that expired on September 30, 1977.[1] Before the contract expired, the Union refused the

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[1] In September, 1979, the parties reached agreement on a successor to the contract that expired in September, 1977. In October, 1980, the parties agreed on a successor to the 1979 contract.

Hospital's request to extend the contract (App. 36a; Tr. 264-266, 271-272, 719).[2]

At the outset of the negotiations in July, 1977, the Hospital proposed that noneconomic issues be discussed and hopefully resolved before wages and other economic issues were addressed (App. 3a, 8a; Tr. 699). Beginning in September, 1977, the Union repeatedly requested that the Hospital make its wage and benefit counterproposal even though not all noneconomic issues had been resolved (App. 3a; Tr. 64, 70, 91, 93-95, 223, 310, 480). On approximately October 1, 1977, the Hospital granted its regular annual wage increase to nonunit employees and improved their health insurance benefit (App. 2a; Tr. 42, 673; GC-16).

On March 22, 1978, the Hospital made a wage and benefit counteroffer to the Union (App. 3a; Tr. 113). The Hospital proposed that unit employees' wages be increased, and their health insurance benefit be improved, to the levels then enjoyed by nonunit employees (App. 3a; Tr. 399-400). The wage and benefit increases were to be effective upon the signing of a new agreement (Tr. 548, 728-729).

While the Union was agreeable to the proposed wage and benefit increases, it demanded that the Hospital's proposed increases be retroactive to October 1, 1977 (App. 3a-4a; Tr. 117). The Hospital rejected this demand for the stated reasons that the Union had chosen not to extend the contract which expired on September 30, 1977, and that a retroactive wage and benefit offer after eight months of bargaining would encourage the Union to prolong negotiations in future years (App. 12a-13a; Tr. 548, 729-730). Although negotiations continued for three more sessions, no agreement was reached on the

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[2] "App." references are to pages of the Appendix to this petition. "Tr." references are to pages of the transcript of the hearing before the Administrative Law Judge. "GC" refers to exhibits introduced into evidence at the hearing by the Board's General Counsel.

Union's demand for wage and benefit retroactivity (App. 4a; Tr. 119, 132-133). On April 18, 1978, the parties agreed they had reached impasse (App. 4a; Tr. 133). Accordingly, the Hospital announced that it would implement its last offer on wages and health insurance (Tr. 133).

The Union filed unfair labor practice charges with the Board asserting that the Hospital had violated § 8(a)(5) of the Act by having postponed its wage counteroffer until March 22, 1978, and by having refused thereafter to agree to the Union's demand that the Hospital's wage offer be retroactive to October 1, 1977. In addition, the Union charged that the Hospital's "withholding" from unit employees the wage increases granted previously to nonunit employees violated § 8(a)(3) of the Act.

On May 14, 1979, the Administrative Law Judge issued his decision in which he concluded that the Hospital had violated the Act as alleged (App. 61a, 64a, 66a-67a). He recommended that the Hospital be ordered to pay to unit employees, retroactive to October 1, 1977, the wage increases offered to the Union on March 22, 1978 and thereby make such employees "whole" for any monetary losses they may have suffered by reason of the Hospital's "withholding" (App. 67a, 69a-70a). On September 28, 1979, a three-member panel of the Board affirmed the rulings, findings, and conclusions of the Administrative Law Judge, and adopted, with minor modification, his recommended order (App. 14a-16a).

The Court of Appeals enforced the Board's order in its entirety (App. 13a).[3] As to the § 8(a)(3) violation, the Court rejected the Hospital's business reasons for declining to meet the Union's demand for retroactivity. The Court agreed with the Board that from the Hospital's § 8(a)(5) violation, it could be

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[3]The Hospital does not seek review of the Court of Appeals' decree insofar as it enforces the Board's order directed to the Hospital's § 8(a)(5) violations.

inferred that the Hospital's "true motivating reason lay elsewhere" (App. 12a).

The Hospital had argued to the Court, as it had to the Board, that the Board's remedial order requiring the Hospital to pay the wage increases retroactive to October 1, 1977, as demanded by the Union, exceeded the Board's statutory authority because the Hospital was being ordered to make a concession it had refused to make in negotiations. The Court rejected the Hospital's argument (App. 13a, n.7).

Reasons for Granting the Writ.

I.

The decisions of the Board and the Court of Appeals raise novel and fundamental questions that have not been, but should be, decided by this Court. The initial question is whether the Board's make whole order is consistent with § 8(d) of the Act.

In *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), this Court held that § 8(d) of the Act barred a remedial order compelling an employer to make a concession in collective bargaining negotiations. In the instant case, the Court of Appeals distinguished *H.K. Porter* as follows: "The *H.K. Porter Co.* case dealt with the Board's authority to remedy section 8(a)(5) violations. The make whole order here is to remedy a section 8(a)(3) violation." (App. 13a, n.7.) The Court of Appeals thus held that § 8(d) of the Act imposes no limit on the Board's authority to remedy violations of § 8(a)(3) of the Act.

On its face, such a holding might appear consistent with the Act's statutory scheme. On the facts of this case, however, it raises a fundamental question concerning the Board's remedial

authority. The Court of Appeals recognized explicitly that the Hospital's conduct found to have violated § 8(a)(3) of the Act — the "withholding of the [retroactive] wage increases" — was "the same" conduct that gave rise to one of the alleged § 8(a)(5) violations, namely, "refusing to embody in its final offer retroactivity to the proposed wage increase" (App. 10a). Indeed, the Board's make whole order directs the Hospital to pay to each unit employee the amount he or she would have received had the Hospital agreed to the Union's demand for retroactivity. The plain effect of this order is to compel the Hospital to make the concession that it declined to make in the negotiations and to accede to the Union's retroactivity demand. This Court's warning that the Board may not even "indirectly, compel concessions" in collective bargaining negotiations was simply ignored. *H.K. Porter Co.* v. *NLRB*, 397 U.S. at 106, citing *NLRB* v. *American National Insurance Co.*, 343 U.S. 395, 404 (1952).

The Court of Appeals defended its enforcement of the Board's make whole order on the ground that "[i]t is a standard type remedy in discrimination cases" (App. 13a, n.7). But this case is not a "standard type" discrimination case, wherein the Board is charged with the task of "weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner." *NLRB* v. *Erie Resistor Corp.*, 373 U.S. 221, 229 (1963). *See* Christensen and Svanoe, *Motive and Intent in the Commission of Unfair Labor Practices: The Supreme Court and the Fictive Formality*, 77 Yale L.J. 1269, 1325 (1968). In such cases, the Board must strike a balance between the *statutory* rights of employees, and the *economic* rights of their employer. In contrast, the § 8(a)(3) issue in this case is unique in that it presents a clash between two statutory rights: the § 7 rights of the Hospital's employees and the Hospital's right under § 8(d) of the Act not to be required to make a concession in negotiations.

To be sure, it is the Board's function in the first instance "to resolve the conflicting interests that Congress has recognized in its labor legislation." *NLRB* v. *Insurance Agents*, 361 U.S. 477, 499 (1960). *See NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. 26, 33-34 (1967). However, in balancing the competing interests in this case, both the Board and the Court of Appeals disregarded the Hospital's statutory right not to make a concession. By characterizing the Hospital's bargaining conduct as a § 8(a)(3) violation, and, under the guise of a make whole order, effectively forcing the Hospital to agree to the Union's demand for retroactivity, the Board and the Court of Appeals contravened the explicit statutory mandate of § 8(d) of the Act. Consequently, the Board's make whole order can hardly be said to "effectuate the policies of" the Act, as required by § 10(c). To the contrary, that order constitutes an unauthorized arrogation of the power, properly in the hands of Congress, "to decide when and if it is necessary to allow governmental review of proposals for collective-bargaining agreements and compulsory submission to one side's demands." *H.K. Porter Co.* v. *NLRB*, 397 U.S. at 109.[4]

The decision of the Court of Appeals has far-reaching implications for the development of national labor policy. If allowed to stand, this case could lead to anomalous results and thus cause confusion as to the scope of the Board's remedial authority.

An illustration of such a result can be derived from the facts of *H.K. Porter*. If the employer's bargaining conduct in *H.K. Porter* were alleged, after this case, to constitute § 8(a)(3) discrimination, the element of "disparate treatment" could readily be found — the employer in *H.K. Porter* was willing to

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[4]Congress failed to pass the 1977 Labor Reform Act, H.R. 8410, 95th Cong., 1st Sess. (1977), which would have expanded the remedial authority of the Board.

make payroll deductions for some things but not for the purpose of paying union dues at the plant in question. 397 U.S. at 100-101. Furthermore, it appeared that the employer's refusal to agree to the union's demand for dues check-off was motivated by a desire "to destroy the union." 397 U.S. at 108-109. If the employer's refusal to agree were found to have violated § 8(a)(3), the Board would not be barred, after the instant case, from remedying that violation by ordering the employer to abandon its "discriminatory" opposition to a dues check-off clause, that is, to agree to the union's demand. Such an order would be contrary to the reasoning and result of *H.K. Porter;* but, as set forth above, this is precisely what the Board has attempted to do by its make whole order in this case.

Therefore, if not reversed, the decision of the Court of Appeals in this case will lead to a substantial erosion of an employer's right not to agree guaranteed by § 8(d) of the Act. The Board will be encouraged to award unions, as a remedy for employers' bargaining conduct termed violative of § 8(a)(3), what the unions could not obtain through bargaining or the exertion of economic pressure. "But the Act as presently drawn does not contemplate that unions will always be secure and able to achieve agreement even when their economic position is weak." *H.K. Porter Co.* v. *NLRB,* 397 U.S. at 109. The ultimate result will be a fundamental realignment of the conflicting interests accommodated by the Act.

Indeed, a decision by the Board in a recent § 8(a)(5) case leaves no doubt that the Board's goal is to render § 8(d) nugatory. In *Southside Electric Cooperative, Inc.*, 243 NLRB No. 59, 101 LRRM 1605 (1979), an employer granted wage and benefit increases to its unrepresented employees while it was negotiating with a union representing other of its employees. The employer was found to have bargained in bad faith. As part of its remedy for the employer's bad faith bargaining, the Board ordered that the unit employees be paid

an amount substantially equivalent to the amounts received by the unrepresented employees. To the argument that this remedy exceeded its statutory authority, the Board replied:

> this remedy . . . does not conflict with Section 8(d)'s restriction on the Board's authority to compel a party "to agree to any substantive contractual provision. . . ." To the contrary, it merely restores the *status quo ante* that would have existed had Respondent bargained in good faith.

243 NLRB No. 59, slip op. at 6, 101 LRRM at 1608.

Such a reading of § 8(d) vitiates the policy on which the Act is based: collective bargaining free of "governmental review of proposals . . . and compulsory submission to one side's demands." *H.K. Porter Co.* v. *NLRB*, 397 U.S. at 109. When considered in light of the consequence described above — allowing the Board to circumvent § 8(d) by characterizing bargaining conduct as a violation of § 8(a)(3) of the Act — it shows the compelling need for review of this case.

II.

A second novel and fundamental question posed by this case is whether the failure to make a concession in negotiations can be held to constitute a violation of § 8(a)(3) of the Act, where the sole evidence of unlawful motivation is a contemporaneous refusal to bargain in good faith. This question, which concerns the proper relationship between §§ 8(a)(3) and (5) of the Act, has not been, but should be, settled by this Court.

In *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. at 34, this Court set forth the principles governing claims of discrimination under § 8(a)(3) of the Act. If the employer's conduct is "'inherently destructive' of important employee rights," the employer can be found to have violated the Act without proof of antiunion motivation, and regardless of any proffered business justifications. On the other hand, if the employer's conduct has only a "comparatively slight" adverse effect on § 7 rights, "an antiunion motivation must be proved to sustain the charge *if* the employer has come forward with evidence of legitimate and substantial business justifications for the conduct." *Id.*

Neither the Board nor the Court of Appeals suggested that the Hospital's refusal to agree to the Union's demand for retroactivity was "inherently destructive of important employee rights." Consequently, whether the Hospital should have been held to have violated § 8(a)(3) depends on whether it "has come forward with evidence of legitimate and substantial business justifications" for its conduct, and if so, whether the record contains evidence of unlawful motivation. *NLRB* v. *Great Dane Trailers, Inc.*, 388 U.S. at 34.

Although the Hospital came forward with evidence of legitimate and substantial business justification for its refusal to agree to the Union's demand for retroactivity, the Court of Appeals held that the Board could reasonably have inferred that "the true motivating reason" for the Hospital's refusal was other than as stated (App. 12a). In upholding the Board's inference, the Court of Appeals relied solely on "the Hospital's unlawful piecemeal bargaining strategy": in other words, "its bad faith refusal to make a wages and benefit counterproposal" (App. 12a-13a). Thus, the Court upheld the Board's ruling that the Hospital's refusal to bargain in good faith showed its antiunion purpose.

However, the Board's ruling on this issue conflicts with its own prior decisions. In *Production Molded Plastics, Inc.*, 227 NLRB 776 (1977), *enf'd*, 604 F.2d 451 (6th Cir. 1979), the Board explicitly held that a § 8(a)(5) violation, standing alone, is insufficient to prove antiunion motivation. The Board reached a similar conclusion in *The B. F. Goodrich Company*, 195 NLRB 914, 915 (1972). There, the Board held that after the grant of a new benefit to unrepresented employees, the employer's "refusal to bargain did not create any obligation automatically [that is, absent independent evidence of antiunion motivation] to grant the identical benefit to the represented employees." A refusal to bargain in good faith does not, by itself, prove antiunion motivation because, as the Ninth Circuit has correctly recognized, a "motive to chill unionism . . . is not an element of a section 8(a)(5) unfair labor practice." *NLRB* v. *Triumph Curing Center*, 571 F.2d 462, 474 (9th Cir. 1978).

The determination by the Board and the Court of Appeals that a refusal to bargain in good faith by itself establishes antiunion motivation misconceives the proper relationship between §§ 8(a)(3) and (5) of the Act. Therefore, certiorari should be granted to state the proper relationship between these two sections of the Act, and to dispel the confusion among the Board's decisions on this point.

Conclusion.

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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December 8, 1980

United States Court of Appeals
For the First Circuit

No. 79-1590

SOUTH SHORE HOSPITAL,
PETITIONER,
v.
NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

ON PETITION FOR REVIEW OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD

Before
CAMPBELL and BOWNES, *Circuit Judges*,
and DAVIS,* *Judge, U.S. Court of Claims.*

Michael R. Brown, with whom *H. Daniel Hassenfeld*, and *Herrick & Smith* were on brief, for petitioner.

Charles P. Donnelly, Attorney, with whom *William A. Lubbers*, General Counsel, *John E. Higgins, Jr.*, Deputy General Counsel, *Robert E. Allen*, Acting Associate General Counsel, and *Elliott Moore*, Deputy Associate General Counsel, were on brief, for respondent.

September 18, 1980

CAMPBELL, *Circuit Judge*. South Shore Hospital has petitioned for review of a Board order and decision which found the Hospital had refused to bargain in good faith and had discriminated against unit employees by withholding a wage increase from them.

*Sitting by designation.

I.

The pertinent events are largely undisputed. Since 1974, the Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO (the Union) has represented a unit of technical workers employed at the Hospital and has negotiated three collective bargaining agreements on their behalf. The technical workers, who comprise approximately 100 of the Hospital's 1,200 employees, are the only employees at South Shore represented by a union.

On July 20, 1977, negotiations commenced for a collective bargaining agreement to replace the one due to expire on September 30, 1977. A total of 21 bargaining sessions were held over a nine month period, but no agreement was concluded and, insofar as appears, none has yet been reached. Effective October 1, 1977, all employees except those represented by the Union received a general wage raise ranging in amount from 3 percent to 8.3 percent and the Hospital absorbed an increase in Blue Cross-Blue Shield premiums for the non-unit employees.

The Union presented its demands to the Hospital prior to the first negotiating session, and the Hospital, at the second session on August 10, 1977, submitted to the Union a document containing the Hospital's proposals. The latter was neither a whole economic offer (it did not deal with wages, for example) nor a response to all of the Union's demands. Rather, it was thirteen seriatim proposals which, if accepted, would have changed and/or clarified prior contract language and, in a number of instances, reduced certain benefits employees had enjoyed under the previous collective bargaining agreement. Items the Hospital proposed included lengthening the probationary period for unit employees from 60 to 90 days; restricting certain overtime pay, including a limitation on the circumstances under which premium pay would be accorded em-

ployees called to work in advance of their regularly scheduled shift; replacing the former 75 percent reimbursement tuition assistance program with an unspecified percentage to be determined at the Hospital's discretion; requiring employees on unpaid leave of absence in excess of 30 days to pay their own health and life insurance premiums; and barring Union representatives from entering Hospital premises except to attend scheduled meetings with Hospital administration. The Hospital's proposals on overtime, leave of absence, and tuition assistance were in accordance with its stated policy of seeking to standardize benefits between unit and non-unit employees.

During the first eight months of negotiations, the Hospital took the position that the Union's non-economic proposals and the Hospital's initial proposals should be discussed and hopefully resolved before wages and other economic benefits would be addressed. Consistent with that stance, and despite Union requests, the Hospital repeatedly declined to discuss wages or to make a total economic offer. Indeed, the Hospital did not present a wage proposal until the eighteenth session on March 22, 1978, approximately nine months after negotiations had commenced. By then, both sides had made certain compromises which had led to agreement on many, but not all, of the Hospital's original proposals. Remaining unresolved were the Hospital's proposals on call to work, leave of absence, and access of Union representatives.

The Hospital's March 22 wage offer would have granted to unit employees the same wage and Blue Cross-Blue Shield premium benefits that had been accorded non-unit employees on October 1, 1977, but was not to be retroactive to that date. The Union, stating it would not agree to a contract leaving the members of the bargaining unit getting the same raise as everyone else only six months later, rejected the offer. Negotiations continued for three more sessions. The Union proposed to accept the wage and benefit offer (although not the three

other unresolved proposals) provided the raised wages and benefits were made retroactive to October 1, 1977, but the Hospital stood fast on its refusal to accord retroactivity. Thus, agreement was not reached on wages, nor was agreement reached on the three remaining issues. On April 18, 1978, the parties agreed they had reached an impasse. Shortly thereafter, the Hospital implemented its last offer on wages, *i.e.*, as of the end of April it commenced paying to Union members the wages and benefits earlier accorded non-unit employees.

In findings later upheld by the Board, the Administrative Law Judge (ALJ) stated:

> "I find and conclude that Respondent Hospital violated its statutory obligation to bargain in good faith with the Union by its repeated refusals during the course of some 18 bargaining sessions over an eight-month period to submit to the Union wage or economic counterproposals or to discuss with the Union wages or economic benefits. Respondent Hospital, during this extended period, persistently and adamantly refused to bargain in good faith with the Union over wages and economic benefits which had been proposed by the Union unless and until the Union agreed to reductions in certain existing employee benefits as proposed by the Hospital. Respondent Hospital, by its conduct, was not dealing with the Union 'in a serious attempt to resolve [their] differences and reach a common ground.' [Citation omitted.] Instead, . . . the Hospital was 'rigidly and unreasonably fragmenting the negotiations * * * ' and 'giving the Union the runaround while purporting to be meeting with the Union for purposes of collective bargaining.' [Citation omitted.]"

The ALJ went on to say,

> "Thereafter, commencing March 22, Respondent Hospital persisted in its refusal to bargain in good faith, effectively rejecting any attempt by the Union to 'move the negotiations out of the almost deadlock they were in * * *.'"

Both the refusal to bargain over wages and other economic benefits prior to March 22 and the Hospital's bargaining conduct subsequent to that date were cited as violations of Sections 8(a)(5) and (1) of the National Labor Relations Act, 29 U.S.C. §§ 158(a)(5) and (1).

The Board also held that the Hospital violated Sections 8(a)(3) and (1) of the Act, 29 U.S.C. §§ 158(a)(3) and (1),[1] by "discriminatorily withholding from . . . unit employees from about October 1, 1977 to about April 24, 1978, the wage increases which were granted to non-unit employees, in order to discourage their membership in [the Union]."

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[1] 29 U.S.C. §§ 158(a)(1), (3), and (5) provide, in material part

> "It shall be an unlawful [sic] labor practice for an employer —
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title; . . .
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . .
> * * *
> (5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

II.

We address first the two section 8(a)(5) bad faith bargaining violations.

A. The Hospital maintains that it is customary negotiating procedure as well as desirable strategy[2] to dispose of non-economic issues before turning to major economic matters, since a wage offer may operate to divert attention from the resolution of other matters. *See Federal Mogul Corp.*, 212 NLRB 950, 955 (Miller dissent)("If the Union has won economic gains, it is not likely to be much interested in management's suggestions for revising such items as the transfer, layoff, grievance or leave procedure."), quoting from 1 B. Werne *Law and Practice of the Labor Contract* 223.

The Board, on the other hand, claims the Hospital's strategy unduly hampered the reaching of a collective bargaining contract since it is unrealistic to expect a union to agree to reductions of benefits enjoyed under a former contract without seeing an offer on wages and other economic benefits. Only in the context of a whole economic proposal can the Union assess its position and possibly agree to some reductions.

The Hospital's position that it is permissible to insist on piecemeal bargaining of the sort which occurred here has been rejected by the Board and courts. *Pillowtex Corp.*, 241 NLRB No. 6 (1979), *enf'd without published opinion*, *Pillowtex Corp.* v. *NLRB*, 615 F.2d 917 (5th Cir. 1980); *Federal Mogul Corp.*, 212 NLRB 950 (1974), *enf'd*, *Federal Mogul Corp.* v. *NLRB*, 524 F.2d 37 (6th Cir. 1975); *NLRB* v. *Patent Trader*,

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[2]Managements have been advised that it "is best . . . not to talk wages or money benefits until desired changes have been worked out on other aspects of the agreement. . . . The agreement should be combed from top to bottom before there is a concession on money matters." *Federal Mogul Corp.*, 212 NLRB 950, 952 (1974)(Miller dissent), quoting from 1 B. Werne *Law and Practice of the Labor Contract* 223.

Inc., 415 F.2d 190, 198 (2d Cir. 1969), *modified on other grounds*, 426 F.2d 791 (1970)(en banc)(Board warranted in finding that employer's insistence on postponing, to the end of negotiations, discussion of wages and other fundamental economic benefits reduced flexibility and narrowed range of possible compromise with the result of rigidly and unreasonable fragmenting negotiations); *Adrian Daily Telegram*, 214 NLRB 1103 (1974).

The Board maintains that one party's requirement that specified items be resolved before proposals on major economic items are discussed has the potential of completely frustrating the bargaining obligation: negotiations may be effectively stalled before much substantive discussion ever takes place. Flexibility and hence an important avenue toward reaching agreement are said to be removed if adherence to a specified order precludes consideration of package proposals combining wage and other items.

Under the National Labor Relations Act, the Board is "authorized to order the cessation of behavior which is in effect a refusal to negotiate, or which directly obstructs or inhibits the actual process of discussion, or which reflects a cast of mind against reaching agreement." *NLRB* v. *Katz*, 369 U.S. 736, 747 (1962). We think the present situation is one where the "question of good faith bargaining is for the Board's expertise more than ours." *Kellwood Co.* v. *NLRB*, 434 F.2d 1069 (8th Cir. 1970), *cert. denied*, 401 U.S. 1009 (1971). Hence, we conclude the Board exercised a permissible judgment in concluding that the duty to bargain in good faith imposed by Section 8(a)(5) of the Act, 29 U.S.C. § 158(a)(5), was violated by the employer's repeated refusal in the circumstances that pertained here to discuss wages and major economic benefits unless and until all other proposals calling for reductions in previously enjoyed benefits could be resolved.

The Hospital argues that a similar pattern had been followed in past negotiations and that, in any event, the Union had agreed at the outset that major economic items could be postponed until agreement on other matters was reached. However, the ALJ supportably concluded the Union did not agree to reach resolution on the Hospital's proposals as a precondition to discussion of the Union's demands. Chief Union negotiator Shea testified that Hospital spokeman Brown stated non-economic matters would be discussed, as usual, before economic ones and Shea responded that order was in general acceptable to the Union but that it might be necessary to mix economic and non-economic items toward the end of negotiations. While Alvin Topham, the Hospital's associate director, did not recall Shea's qualification, his testimony does not establish any hard and fast agreement as to the order of resolution. He testified

> "Mr. Brown[3] stated his understanding that the language issues and non-economic issues and some of the economic issues would be discussed first and, hopefully, resolved. And that the wages would be discussed later on in the session."

Even under the Hospital's version of the events, there was no unequivocal pact to *resolve* non-wage items first, but only a loose agreement to *discuss* them first with a hope of reaching resolution before turning to wages. As time went on and agreement on the Hospital's proposed reductions had not been reached, the Union made it clear that it desired to know what the Hospital's wage proposals were.

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[3]Mr. Brown was the Hospital's chief negotiator.

Thus, on the present record, we conclude the Board's determination that the Hospital failed to bargain in good faith from approximately September 16, 1977 to March 22, 1978 is supported by substantial evidence on the record as a whole.

B. A further question arises with respect to the Board's finding that the Union continued to violate Section 8(a)(5) by bargaining in bad faith *after* March 22, 1978. On that date the Hospital abandoned its refusal to make a wages and benefits proposal; it offered the same increases given on October 1, 1977 to non-unit employees, but declined to make these retroactive to the time increases were given to non-unit personnel. The ALJ did not describe the conduct after March 22, 1978 which he felt had violated Section 8(a)(5) other than to say,

> "[C]ommencing March 22, Respondent Hospital persisted in its refusal to bargain in good faith, effectively rejecting any attempt by the Union to 'move the negotiations out of the almost deadlock they were in . . . .'"

As best we can discern, the ALJ's objection to the Hospital's bargaining centered on its refusal to make its wage proposal retroactive to October 1, 1977.

Standing alone, an employer's refusal to budge on a wage offer would not be indicative of bad faith bargaining for the Act specifically provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession," 29 U.S.C. § 158(d). Thus an employer's adherence to a particular otherwise lawful position, or its rejection of a union proposal, even though a deadlock is produced, is not unlawful so long as not motivated by a desire to thwart agreement or other improper purpose. *Glomac Plastics, Inc.* v. *NLRB*, 592 F.2d 94, 98 (2d Cir.

1979); *NLRB* v. *Pacific Grinding Wheel Co.*, 572 F.2d 1343, 1348-49 (9th Cir. 1978). But the Board argues that the Hospital's otherwise lawful refusal to make its wage proposal retroactive was here tainted by an improper purpose to discourage union activity. According to the Board, when the Hospital's original piecemeal bargaining strategy failed to extract concessions from the Union, the Hospital then took the discriminatory and punitive step of offering wage increases which, because coming later, would be less than those accorded unrepresented employees. In support, the Board points to a statement of Michael Brown, the Hospital's chief negotiator, made at the April 3, 1978 negotiating session, that the Hospital would have made its economic counterproposal last fall had the Union been agreeable to the Hospital's original proposals. The Board's argument, in other words, is that the Hospital, by refusing to embody in its final offer retroactivity to the proposed wage increase, was "discrimina[ting] in regard to . . . [a] term or condition of employment [i.e., wages] to encourage or discourage membership in any labor organization . . . ." 29 U.S.C. § 158(a)(3). So phrased, the second alleged section 8(a)(5) violation is ultimately the same as the alleged section 8(a)(3) violation, and we deal with it in the latter form, upholding the Board as to both types of violation.

III.

With respect to the alleged Section 8(a)(3) violation, the ALJ and the Board concluded,

> "Respondent Hospital's withholding of the [October 1, 1977] wage increases from the Union employees was in substantial part discriminatorily motivated and, consequently, violative of Section 8(a)(3) and (1) of the Act."

They went on to state,

> "[The withholding action] cannot be justified as serving any legitimate interests of the Employer. This discriminatory conduct plainly had a natural and foreseeable effect of chilling employee desires for Union representation. Such conduct was intended to punish the unit employees because they had selected Union representation. Respondent Hospital therefore violated Section 8(a)(3) and (1) of the Act."

As the Board points out, absent unlawful motive, an employer, during the course of negotiations, does not violate the Act by withholding wage increases from represented employees. *Chevron Oil Co.* v. *NLRB*, 442 F.2d 1067, 1074 (5th Cir. 1971). The determinative factor is thus motive.

The Hospital made it clear during negotiations, and does not now deny, that inability to pay was not the reason for its refusal to make its wage offer retroactive to October 1, 1977.[4] Rather, the Hospital's stated reasons were the Union's refusal in September 1977 to extend the existing collective bargaining contract — which refusal held open the threat of a Union strike[5] and led to the administrative dilemma of having no contract to utilize in dealing with employees — and the potential impact of granting retroactivity on future negotiations. The Hospital says it feared that according retroactivity after nine months of negotiations might prove a future disincentive to the prompt conclusion of a collective bargaining agreement.

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[4]In June 1977, the Board of Trustees had approved a budget providing a wage increase for all employees effective for the fiscal year beginning October 1, 1977.

[5]The Union did strike for one day on February 6, 1978.

We have frequently held that the Board may not reject the employer's stated business reasons unless there is evidence from which it can reasonably be inferred that the true motivating reason lay elsewhere. *See, e.g., NLRB* v. *Eastern Smelting & Refining Corp.*, 598 F.2d 666 (1st Cir. 1979). Here we think the record does permit such an inference, and we accordingly sustain the refusal of the ALJ and Board to accept the Hospital's articulated business justifications for its disparate treatment of unit employees vis-a-vis non-unit employees.

We start with the second alleged justification — the Hospital's desire to discourage needlessly drawn out negotiations. We do not pass on the question whether, after unduly prolonged negotiations during which the employer bargained in good faith, an employer's refusal to extend retroactively to unit employees a wage increase granted similarly situated[6] non-unit employees may be justified by the length of or conduct during bargaining sessions. Here, however, the Board could conclude that it was the Hospital's unlawful piecemeal bargaining strategy, not the Union's conduct, which produced the protracted negotiations. The Hospital cannot invoke its deterrent rule to punish the Union for the Hospital's misconduct.

The Hospital's first justification similarly fails. The Union's refusal to agree to extend the existing contract for any significant length of time occurred while the Hospital's bad faith bargaining strategy was ongoing. The Hospital's alleged dilemma of having no contract to utilize was, in view of its bad

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[6]The Hospital has not claimed, for example, that unit employees were less skilled than non-unit employees or that supply and demand factors would justify the lower wage, in absolute terms, paid unit employees. We use the term "similarly situated" to designate, in view of the Hospital's policy of standardized employee benefits, the lack of any significant difference between the two groups of employees other than union representation.

faith refusal to make a wages and benefit counterproposal, much of its own making, and blame cannot be shifted to the Union. So, at least, the Board could determine — our function being not to reassess matters de novo but to decide whether the Board's view is supported by substantial evidence.

The Hospital's articulated reasons for denying unit employees benefits granted non-unit employees being unavailing, and no legitimate reason appearing, we uphold the Board's conclusion that the Hospital's conduct was discriminatorily motivated.[7]

The Hospital's petition for review is dismissed and the Board's order is enforced.

So ordered.

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[7] The Hospital argues the Board's order requiring it to "make whole the [unit] employees . . . for any monetary losses they may have suffered as a result of the Hospital's discriminatory withholding of the wage increases granted to its non-unit employees" is, in view of *H.K. Porter Co., Inc.* v. *NLRB*, 397 U.S. 99 (1970), in excess of its authority. The *H.K. Porter Co.* case dealt with the Board's authority to remedy section 8(a)(5) violations. The make whole order here is to remedy a section 8(a)(3) violation. It is a standard type remedy in discrimination cases and does not exceed the Board's authority.

245 NLRB No. 110

JMT
D-5683
Weymouth, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

SOUTH SHORE HOSPITAL
and
MASS. HOSPITAL WORKERS UNION, LOCAL 880, S.E.I.U., AFL-CIO[1]

CASE 1-CA-13898[2]

Decision and Order.

On May 14, 1979, Administrative Law Judge Frank H. Itkin issued the attached Decision in this proceeding. Thereafter, Respondent filed exceptions and a supporting brief, and the General Counsel filed a brief in support of the Administrative Law Judge's Decision.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the record and the attached Decision in light of the exceptions and briefs and has decided to affirm the rulings, findings,[3] and conclusions of the Admin-

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[1]The name of the Union appears as amended at the hearing.

[2]This case was formerly consolidated with Case 1-CA-14121, which was severed at the hearing pursuant to a settlement agreement.

[3]Respondent has excepted to certain credibility findings made by the Administrative Law Judge. It is the Board's established policy not to overrule an administrative law judge's resolutions with respect to credibility unless the clear preponderance of all the relevant evidence convinces us that the resolutions are incorrect. *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing his findings.

istrative Law Judge and to adopt his recommended Order, as modified herein.[4]

Order.

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board adopts as its Order the recommended Order of the Administrative Law Judge as modified below, and hereby orders that the Respondent, South Shore Hospital, Weymouth, Massachusetts, its officers, agents, successors, and assigns, shall take the action set forth in the said recommended Order, as so modified:

1. Substitute the following for paragraph 1(c):

"(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act."

2. Substitute the following for paragraph 2(e):

"(e) Notify the Regional Director for Region 1, in writing, within 20 days from the date of this Order, what steps Respondent [sic] has taken to comply herein."

Respondent has requested oral argument. This request is hereby denied as the record, the exceptions, and the briefs adequately present the issues and positions of the parties.

[4] We find that the broad injunctive order recommended by the Administrative Law Judge is not warranted in this case and that a narrow order is sufficient to remedy the violations found herein. According we shall modify the recommended Order and notice to reflect this change.

3. Substitute the attached notice for that of the Administrative Law Judge.

Dated, Washington, D.C. September 28, 1979

HOWARD JENKINS, JR., Member

BETTY SOUTHARD MURPHY, Member

JOHN C. TRUESDALE, Member

(Seal) **NATIONAL LABOR RELATIONS BOARD**

Appendix

Notice to Employees

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD
AN AGENCY OF THE UNITED STATES GOVERNMENT

After a hearing at which all parties had an opportunity to present evidence, and cross-examine witnesses, the National Labor Relations Board has found that we violated the National Labor Relations Act, as amended, and has ordered us to post this notice. We intend to abide by the following:

> WE WILL NOT fail or refuse, upon request, to bargain collectively and in good faith with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment with Mass. Hospital Workers Union, Local 880, S.E.I.U., AFL-CIO, as the exclusive bargaining agent of our employees in the unit described below, by refusing to bargain with the Union over wages and other economic benefits which were proposed by the Union unless and until the Union agreed to reductions in certain existing benefits as proposed by us, and by refusing to bargain in good faith with the Union with respect to wages. The appropriate bargaining unit is:
>
> All full-time, permanent part-time and part-time employees of South Shore Hospital at our Weymouth facility employed as X-ray technologists, nuclear technologists, laboratory technicians, labortory [sic] technologists, respiratory therapists, respiratory therapy technicians, physical therapy assistants, operating

room technicians, EKG technicians, orthopedic technicians and pharmacy technicians, *but excluding* all licensed practical nurses, registered nurses, professional employees, clerical employees, all students, temporary and casual employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT discourage membership in said Union, or in any other labor organization, by discriminatorily withholding from the above unit employees wage increases which were granted to our employees who are not in the above unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the National Labor Relations Act.

WE WILL, upon request, bargain collectively and in good faith with said Union as the exclusive bargaining agent of our employees in the above unit with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment, and, if an understanding is reached, embody such understanding in a signed agreement.

WE WILL make whole our employees in the above unit for any monetary losses they may have suffered as a result of our discriminatory withholding of wage increases granted to our nonunit employees, with interest.

SOUTH SHORE HOSPITAL

_____
(Employer)

Dated _____ By _____
(Representative) (Title)

This is an official notice and must not be defaced by anyone.

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office, Keystone Building, 12th Floor, 99 High Street, Boston, Massachusetts 02110, Telephone 617-223-3313.

JD-263-79
Boston, MA

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SOUTH SHORE HOSPITAL

and

Case 1-CA-13898

MASS. HOSPITAL WORKERS UNION,
LOCAL 880, S.E.I.U., AFL-CIO

Gary Glaser and *Irwin Weiner, Esqs.*, for
General Counsel.
Jonathan Hiatt, Esq., for
Charging Party.
Michael Brown and *Sibley Reppert, Esqs.*, for
Respondent.

Decision

FRANK H. ITKIN, Administrative Law Judge. Unfair labor practice charges were filed by the Union on November 28, 1977, and were amended on December 23, 1977 and on May 9, 1978. A complaint issued on January 5, 1978, and was amended on March 30 and on May 15, 1978, and later at the opening of the hearing in this case. Hearings were conducted in Boston on June 26, 27, 28, 29 and on September 5, 1978. Briefly, General Counsel alleges that from about September 15, 1977 to about March 22, 1978, Respondent Hospital refused to bargain with the Union over wages and several other economic benefits which were proposed by the Union unless or until the Union agreed to reductions in certain other existing benefits as proposed by the Hospital. General Counsel further

alleges that, thereafter, commencing about March 22, 1978, Respondent Hospital refused to bargain in good faith with the Union with respect to wages. General Counsel contends that Respondent Hospital, by the foregoing conduct, violated Section 8(a)(5) and (1) of the National Labor Relations Act. In addition, General Counsel alleges that Respondent Hospital also withheld from the unit employees involved wage increases which were granted to non-unit employees from on or about October 1, 1977 to on or about April 24, 1978, because the unit employees had engaged in protected Union activities, in violation of Section 8(a)(3) and (1) of the Act. Respondent Hospital denies that it violated the Act as alleged. Upon the entire record, including my observation of the witnesses, and after due consideration of the briefs of counsel, I make the following findings of fact and conclusions of law:

Findings of Fact

A. *Introduction*

Respondent Hospital, a Massachusetts corporation, maintains its principal place of business in Weymouth where it is engaged in operating a health care facility. It is undisputed and I find and conclude that Respondent Hospital is an employer engaged in commerce as alleged. It is also undisputed and I find and conclude that the Charging Party Union is a labor organization as alleged. Further, it is undisputed and I find and conclude that,

> all full-time, permanent part-time and part-time employees of Respondent at its Weymouth facility employed as xray [sic] technologists, nuclear technologists, labora-

tory tech cians, laboratory technologists, respiratory therapists, respiratory therapy technicians, physical therapy assistants, operating room technicians, ekg technicians, orthopedic technicians and pharmacy technicians, *but excluding* all licensed practical nurses, registered nurses, professional employees, clerical employees, all students, temporary and casual employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act.

On April 4, 1974, a majority of the Hospital's employees in the above unit, by a secret ballot election conducted under the supervision of the Massachusetts State Labor Board Commission, designated or selected the Union as their representative for the purposes of collective bargaining. At all times since April 4, 1974, as stipulated, the Union has been the collective bargaining agent of a majority of the employees in the above unit, and by virtue of Section 9(a) of the Act, has been and is now the exclusive representative of the unit employees for the purposes of collective bargaining.

The Hospital, according to the uncontroverted testimony of Union representative Gerald Shea and Hospital associate director Alvin Topham, employed at all times pertinent to this case some 1200 employees. About 100 of these employees are included in the above unit and are therefore represented by the Union. The remaining employees are not represented by a labor organization. The Hospital and the Union have executed three collective bargaining agreements pertaining to the unit employees since May 1974. The most recent agreement expired on September 30, 1977.

Union representative Shea, the Union's chief spokesman during the current contract negotiations, testified that by let-

ter dated June 13, 1977 (G.C. Exh. 2), the Union notified the Hospital of its "intent to terminate our agreement as of September 30, 1977 * * *" and requested "a meeting * * * so that we may present proposals for modifications in the agreement effective October 1, 1977." The Union suggested "an initial meeting sometime the week of June 27." The parties were unable to meet on that date. Subsequently, on July 7, 1977, Union representative Shea sent Michael Brown, attorney and chief spokesman for the Hospital, a letter containing a "copy of the Union's 1977 contract proposal." Shea noted:

* * *

> We're looking forward to meeting with you on [July 20, 1977]. I hope the Hospital will be prepared to respond to all or most of our proposals then. If you will be making any proposals for the Hospital, I would appreciate receiving them in advance of our meeting if at all possible.

G.C. Exh. 4 is a copy of the Union's proposed 1977 agreement. Shea explained "that the proposal, as we submitted it to the Hospital in early July, was the entire existing contract then in effect plus our proposed changes." The parties thereafter met on the following dates:

July 20, 1977
August 10
August 17
August 31
September 16
September 21
September 27
September 28
October 3
October 4
October 13
October 20
November 2
November 3
November 15
November 16
February 1, 1978
March 22
March 30
April 3
April 18

B. *The Bargaining Sessions*

1. July 20, 1977:

Union representative Shea testified that at this initial session on July 20 the Union "reviewed its proposals for Management" which proposals "had already been submitted through the mail"; the Union "did go through each and every one of its proposals and the reasons for them"; the Union "made an oral presentation concerning another item [a compensatory day off for holiday worked] and subsequently submitted the proposal in writing to the Hospital" (G.C. Exh. 5); and the parties briefly discussed the Union's compensatory day off proposal. Shea further testified that the Union requested the Hospital to bargain about wages "at the first bargaining session." Shea explained:

> At the first bargaining session on July [20], where the Union reviewed its proposals * * * previously submitted by mail, the Union noted that in addition to the specific proposals in * * * [G.C. Exh. 4], that the Union was interested in looking at the question of minimum to maximum ranges in the Hospital's pay scale for the technical employees, and that we would be interested to know if this were also something the Hospital would be interested in looking at whenever the Hospital was prepared to make us a counterproposal.
>
> * * *

Hospital associate director Topham recalled "that the Union had requested economic counterproposals from time to time, but I don't know when." Topham later acknowledged that "at the July 20 session the Union had requested a total counterproposal." This first session ended, according to Topham, with Hospital attorney and chief spokesman Brown

requesting "data supporting [the Union's] wage proposals."[1] And, as Shea recalled, "on July 20 the Hospital did not respond" to the Union's contract proposals.

2. August 10, 1977:

At the first session on July 20 Hospital attorney and spokesman Brown had requested the Union to provide "data supporting" its wage proposals. Union representative Shea recalled that at the next session on August 10 the Union, as requested, "presented certain statistics and results of some studies concerning hospital rates and benefits in the greater Boston area, to back up its [economic] proposals." In addition, at this second session, the Hospital submitted to the Union a written document containing some 12 "initial proposals." See G.C. Exh. 6. The Hospital's proposals pertain to, *inter alia*, the "probationary period" of employees; "overtime"; "call to work"; "pyramiding"; "hospital work"; "hours"; "holidays"; "vacation"; "tuition assistance"; "unpaid leaves of absence"; "union activities"; "schedules"; and the term of the agreement. The document states: "The above are the initial proposals of the Hospital which reserves the right to submit further proposals."

Shea testified that the Hospital's "proposals were both economic and non-economic, and we discussed all the Hospital's [proposals] at first." Shea claimed, *inter alia*, that Hospital "*proposal number one* on the probationary period would have changed the time of the probationary period making it longer * * *"; "*proposal number 2* on overtime would have restricted the opportunity for part-time employees to earn overtime * * *"; "*proposal number 3* on call to work would have * * * substantially reduced the opportunity for

[1] Brown did not testify in this proceeding.

employees to earn premium days"; "*proposal number 5* would have written into the contract a prohibition against employees doing anything other than Hospital assigned work"; "*proposal number 6* * * * would have restricted in certain situations the ability of employees to work overtime* * *"; "*proposal number 7* would have changed the formula by which part-time employees had their holiday benefit computed and changed it in a way where the holiday benefit would have been [reduced]"; "*proposal number 8(a)* * * * would have changed the formula for figuring the vacation benefit for part-time employees and would have reduced the benefit in most cases"; "*proposal number 9* would * * *, in lieu of the present section in the contract which [contains] * * * a certain specific tuition assistance program, * * * [have] replaced that article with an open-ended article whereby * * * the unionized employees would have to accept whatever the Hospital designated to be the tuition assistance program, and there was no guarantee here that even the same level would be maintained"; "*proposal number 10* would have changed the policy for paying health insurance premiums and life insurance premiums during certain leaves of absence so as to reduce the number of months that an employee on leave would be eligible to have the Hospital pay its share of the premium"; and "*proposal number 11* would have substantially restricted the access by Union representatives to the Hospital premises."[2]

Shea further testified that as of August 10, "none" of the Union's "economic proposals" had "been addressed" by the Hospital. Shea added that,

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[2]Hospital associate director Topham asserted, *inter alia*, that Hospital proposals 4 (pyramiding), 5 (hospital work) and 6 (work day) were "to clarify contract language." Topham also claimed that proposal 10 (health and life insurance benefits during leave of absence) was "to incorporate in contract language and for clarity sake."

> of the non-economic proposals, on August 10, the Hospital gave us a reply — very brief — on each item.

Shea also noted, *inter alia*, that the Union's proposed contract (G.C. Exh. 4) contained "a proposal concerning an elimination of the scope of the agreement clause, eliminating the zipper clause." The Hospital's proposals (G.C. Exh. 6) do not refer to this item and, according to Shea, "we asked about it." The Hospital "didn't want to see any change in the contract language." Likewise, the Union's proposed contract contained a proposal that "asked that the employee's personnel file be open to his or her inspection * * *." The Hospital's proposals made no mention of this item; this subject was also mentioned at this session; and "the Hospital saw no such need for such availability." There was also, according to Shea, a "brief discussion" on "compensatory day for holiday time worked."[3]

The Union, according to Shea, had requested "a response" to its proposals at the August 10 session — "we requested a counterproposal from the Hospital." Hospital associate director Topham testified:

> Q. Now, it's been brought out Mr. Topham that the General Counsel's Exhibit Number 6, Hospital's proposal on August 10, did not include a wage and benefit proposal. Could you tell us in your words why the Hospital

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[3]She [sic] explained: "The Hospital, in giving us its * * * written proposals [on August 10], had included agreement on two Union issues, * * * differential in vacation pay and scheduling of vacation time. That, there was virtually no discussion of. It was simply in the written papers they gave us and we noted it when we looked at it. And it * * * seemed in response to what we'd asked. * * *" Shea further explained that the Union's proposals on these subjects, as accepted by the Hospital, essentially restated "existing practice."

> didn't include a wage and benefit proposal in its August 10 proposal?
>
> A. The Hospital felt that the proposals that were submitted initially were important proposals and they wanted to get resolution of those proposals prior to the introduction of the wage proposal.
>
> Q. Why?
>
> A. They felt that to do otherwise would, number one, change the accepted process that had been followed each year. And, secondly, once a wage proposal is on the table it would have a negative effect of trying to orient the discussion toward the resolution of outstanding proposals.

And, according to Shea, Hospital attorney and spokesman Brown stated "that non-economic matters would be discussed, as usual, before economic matters were * * *." Shea, as he testified, responded that,

> in general, that was acceptable to the Union. However, I [Shea] wanted to note that it may be possible — it may be necessary — to mix economic and non-economic items toward the end of negotiations.

Brown "did not disagree" with Shea's statement. And, as Shea further explained,

> there was an agreement reached to that effect in principle, but the Union added the proviso that * * * it may well become necessary to mix non-economic items and economic items before the resolution of the non-economic items.[4]

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[4]Shea acknowledged that, "* * * going by our original agreement to get non-economic items out of the way, we did not make another request for the Hospital to submit an economic offer until the September 16 meeting, when we did make such a request * * *."

3. August 17, 1977:

Union representative Shea recalled that at the August 17 session "the Hospital responded on the Union's non-economic proposals." Hospital associate director Topham summarized the Hospital's response in part as follows. The Hospital responded to "the Union proposals concerning notification to the steward" by stating "no"; the Hospital responded to the Union proposal concerning "a wage increase effective October 1, 1977" by stating "that it was economic and * * * set it aside"; the Hospital responded to the Union's proposal "as to increasing the rate after promotion" by stating "that it was economic and * * * set it aside"; the Hospital responded to the Union's proposal "to substitute some minimum pay and shift differential and week-end differentials" by stating "that it was economic and * * * set it aside"; the Hospital responded to the Union's proposal on "an increase in the call to work proposal" by stating that "the Hospital had a proposal on that"; the Hospital responded to the Union's proposal "to change the relief and higher classification" by stating "no"; the Hospital responded to the Union's proposal "to change * * * the on-call period pay" by stating that "it was economic and * * * set it aside"; the Hospital responded to the Union's proposal to make a change "relating to the meal period" by stating "no"; the Hospital responded to the Union's proposal to make "additions to the holiday provisions by adding one holiday" by stating "that it was economic and * * * set it aside"; the Hospital responded to the Union's proposal on making "various changes to the vacation article" by stating "that it was economic and * * * set it aside"; the Hospital responded to the Union's proposal on "sufficient coverage for the vacationing employees"

by in effect "saying no"; the Hospital responded to the Union's proposal pertaining to "changes to the sick leave provisions by stating that the Hospital" was studying them; the Hospital responded to the Union's proposal on insurance by stating "that they were economic and set them aside"; the Hospital responded to the Union's proposal pertaining to employee personnel files by stating "no"; the Hospital responded to the Union's proposal "concerning the event of [employee] suspension or discharge" by stating "no"; the Hospital responded to the Union's proposal of a "language addition concerning the Union representative article" by stating that the Hospital "had a proposal on this issue"; and the Hospital responded to the Union's proposal that "article 19, scope of the agreement, be eliminated" by stating "no."[5] Shea claimed that the Hospital had presented no counterproposals to the Union's initial proposals at this session.[6]

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[5]As noted above, at the August 10 session, the Hospital and the Union had agreed upon the Union's proposals pertaining to scheduling of vacations and inclusion of wage differentials in vacation pay. As testified by Shea, these proposals essentially restated existing practice. Further, although Topham claimed that the Hospital also "had a proposal" on the Union's proposal pertaining to "call to work," counsel for General Counsel notes (br. p. 4, n. 8) that the Union's proposal and the Company's proposal pertain "to entirely different issues." (Cf. G.C. Exh. 6, p. 1 and G.C. Exh. 4, p. 10). Likewise, the Hospital's proposal and the Union's proposal pertaining to "Union representative" address different issues (Cf. G.C. Exh. 6, p. 3 and G.C. Exh. 4, p. 44).

[6]Shea acknowledged that at this session the parties discussed the Union's proposal to make a "change in the zipper clause." The Union "asked about" its proposal and the Hospital "didn't want to see any change in the contract language." There was also "some discussion of the Union's compensatory day off proposal" at this session.

4. August 31, 1977:

Hospital associate director Topham testified that after the August 17 session, "the Union, aside from its request for wage and benefit counterproposals," did not "request that its proposals * * * be discussed instead of the Hospital's proposals." Topham also explained that from August 17, 1977 to March 22, 1978, the negotiations "focus[ed] primarily" on the Hospital's proposals.[7] And, Union representative Shea testified that by this fourth session, the parties "reached an agreement on the Hospital's proposal concerning pyramiding * * *."

In addition, Shea recalled:

> Mr. Brown told us a number of times by August 31, to the best of my recollection, that [he] didn't see any reason [why] technical employees should be enjoying any better benefits than other employees at the Hospital.

Shea did not "agree with the Hospital's stated policy of equivalency between Union and non-union employees." Shea asserted that he was "here to negotiate the contract for the bargaining unit people only * * *." As Shea further explained,

> There was some discussion of the Hospital's position, that they wanted to make sure that the technical bargaining unit * * * didn't have any more benefits than other people at the Hospital.
>
> * * *

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[7]Topham noted, however, that the Union proposal on a "compensatory day was discussed several times * * * and ultimately was resolved" and "there was also discussion dealing with notification of the Union in the event there was discipline to a unit employee * * *."

> Our objection was that it was not a relevant issue since we did not represent the other employees * * *.

Shea added: "* * * I also told them that we did not come to the bargaining table to give up benefits just because somebody else didn't have them. We were willing to negotiate on our benefits and our whole package, but we were not going to do it on the basis of what other people did or didn't have."

Further, Shea testified that the Union "proposed" that "it would arbitrate" the Company's proposal "concerning tuition assistance" or "it would negotiate a specific change in the tuition assistance program should the Hospital wish to propose one." According to Shea,

> The Hospital, through Mr. Brown as spokesperson, had at the August 31 session said, as part of a discussion about tuition assistance, that the Union's refusal to agree to the Hospital's proposal relative to the tuition assistance could well mean that we'd [have] a contract in December.

Shea noted, *inter alia*, that "during the meetings that transpired in August," the "parties did discuss economic items" such as, for example, "overtime", "call to work", the Union's "proposal on the compensatory day for a holiday", the "work day proposal", "holiday pro-rata for part-timers", "vacation pay for part-timers", "leave of absence", and "tuition assistance." And, R. Exh. 5 is the "back up [economic] information" which was "provided to the Hospital" by the Union on or about this time.

5. September, 16, 1977:

Union representative Shea testified that at this fifth session on September 16, "we did make * * * a request" for "the Hospital to submit an economic offer" or counterproposal — "we asked for a whole economic offer, a counterproposal to our proposals." Hospital associate director Topham acknowledged that "the Union had requested economic counterproposals from time to time * * *" — the Union "had requested on several occasions throughout the fall that the Hospital present a total wage and economic proposal * * *." And, as Union representative Shea recalled,

> Mr. Brown responded that the Hospital would not make such an offer at this time, that the Union had agreed, he contended, in an August 10 bargaining session, that non-economic items would be cleared up before economic items. I [Shea] contested that fact. He [Brown] protested that we made such an agreement. He also said that it was simply too early for such an offer to be made by the Hospital.
>
> * * *
>
> Mr. Brown said, at about the same [time] at this bargaining session, that the Hospital would make its offer once the issues that were currently under discussion were resolved.

The items "under discussion" were, according to Shea, the "majority of the Hospital's proposals to [the Union] which we [the Union] had been discussing in the past several bargaining sessions." See G.C. Exh. 6.

Further, Shea explained that the "reason" why the Union had requested "an entire economic proposal" from the Hospital "at that time" was,

> because in our opinion negotiations had bogged down with the Hospital insisting that * * * the Union give up certain existing benefits. And, we felt that it was not possible for us to consider the proposals any further that the Hospital was making without seeing their whole economic offer.

Nevertheless, according to Shea, the Union continued "discussing" the Hospital's proposals and possible "compromises." The Union had offered "compromises" or "counterproposals as to the reductions in benefits * * * requested by the Hospital."[8]

Shea recalled the following exchange between the parties at this session:

> At the close of the bargaining session, Mr. Brown on behalf of the Hospital said that they had contacted a mediator during the break in negotiations a few minutes previous, and that we would be hearing from the mediator. I [Shea] objected strongly to this. I said that I thought it was irresponsible behavior on the part of the Hospital's bargaining committee, and that the responsi-

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[8]Shea explained, *inter alia*, that "on *Hospital proposal 7* we had offered to alter the base period that was used to compute the pro-ration for the holiday benefit * * *. And, we said to the Hospital that we would be willing to consider other proposals, be it three months, six months or whatever"; that "on *Hospital proposal number 9* concerning tuition assistance, the Union proposed * * * that it would arbitrate this issue or that it would negotiate a specific change * * *"; that "on *Hospital proposal number 3* concerning call to work, the Union had indicated several areas in which it might be able to compromise * * *"; and that "agreement" was reached on *Hospital proposal number 4* and *Hospital proposal number 5* ("pyramiding" and "hospital work"). Counsel for Respondent notes in his brief (pp. 14-16) that various Hospital proposals were discussed at this session. Shea recalled that possibly one or two of the Union's proposals were also discussed at this session.

> ble and appropriate behavior would be for the Hospital to make us a whole economic offer * * *.

Brown refused to make such an economic offer.

6. September 21, 1977:

The sixth session was held on September 21 at the offices of the Federal Mediation and Conciliation Service. The parties "reviewed the status of the negotiations." Hospital associate director Topham, after reviewing his notes, acknowledged that Union representative Shea had stated at this session: "We have had no economic proposals". Hospital spokesman Brown responded, according to Topham's notes,

* * *

> Have to have direction before costing, in order to budget funds. Must have framework of contract first. Employer can't talk wages until we know other costs.

* * *

Following this session, on September 22, the Union sent to the Hospital a 10-day notice of intention to picket and leaflet the Hospital commencing October 4, citing the "Hospital's intransigence in negotiations * * *." See R. Exh. 6.

7. September 27, 1977:

Union representative Shea testified that at the September 27 session, "both the Union and the Hospital proposed various trades." The Union "proposed a form of pro-rated holiday pay for part timers based on average hours in exchange for its

proposal on the holiday compensatory day." Shea explained that R. Exh. 10 is the Union's proposal presented to the Hospital pertaining to "compensatory day off" and "work day"; the Hospital "made counterproposals on the holiday compensatory day"; and "that counterproposal was tied in * * * to the Hospital proposal on pro-rating holiday and vacation pay for part timers — part of the trade that was proposed." Shea also recalled that he "took a position * * * that the present proposals taken by the Hospital [proposals number 2 and 3 pertaining to "overtime" and "call to work"] were unacceptable."

8. September 28, 1977:

Union representative Shea testified that on or about this session on September 28 the Hospital withdrew its "proposal number 12 concerning schedules." See G.C. Exh. 6. The Hospital and the Union "continued to discuss the items such as the holiday compensation day * * *, [the] leave of absence provision * * * [and] we discussed the pro-rata pay of holiday and vacation benefits for part time employees * * *." Shea explained:

> We were discussing them and * * * both sides were making proposals and trying to make an agreement on them.

The contract between the parties was to expire on September 30, 1977. Shea acknowledged that, "as the meeting of September 28 drew to a close, it was obvious to both sides * * * that the parties had not reached a new contract", and "the Hospital was willing to extend the contract." Hospital associate director Topham recalled:

> * * * The Hospital wanted to extend the contract for about two weeks. And the Union stated it did not want to extend past October 3rd.

The contract expired on September 30, 1977. And, as stipulated by the parties,

> effective September 26, 1977, [the Hospital] granted to all non-unit employees a general wage increase ranging in amount from approximately 3 percent to 8.3 percent, which was the same general wage increase offered by [the Hospital] to the Union for unit employees on March 22, 1978.

See G.C. Exh. 21. And, in addition, the Hospital "absorbed" an "increase in premium costs" to be charged all non-unit employees by Blue Cross and Blue Shield, effective October 1, 1977. See G.C. Exh. 16.

9. October 3, 1977:

At this session on October 3 Union representative Shea, as he testified, repeated his "request for a wage economic counterproposal." Shea recalled:

> On October 3 I again asked the Hospital to make us a whole economic offer, saying that we weren't getting anywhere without such an offer on the table and that the Union could not consider any further compromises on the Hospital's demands to us, * * * the demands that they first gave us on August 10 that the Union give up certain benefits. * * *

Hospital spokesman Brown responded that "there was an agreement reached on August 10 that we were going to discuss non-economics first and he intended to clear up the non-

economic issues before getting onto economic issues." Hospital representative Topham, after reviewing his bargaining notes of this session, acknowledged that Shea had stated,

> We [the Union] never agreed to that. After discussion — we qualified decision on that issue.[9]

The Hospital also "notified" the Union that,

> since the contract had expired they * * * would not be assuming the additional cost of the increased premiums for Blue Cross-Blue Shield for [the] bargaining unit.

Hospital representative Brown announced at this session that "because of some clerical error * * * the members of * * * [the] bargaining unit had been mailed a notice saying that the increased cost of premiums would be assumed by the Hospital * * *." See G.C. Exh. 16. The Hospital later sent notices to the "bargaining unit employees" stating (G.C. Exhs. 17 and 18):

> The letter which you received recently regarding an increase in the Hospital's contribution for family Blue Cross/Blue Shield coverage was only meant for employees *not* represented by the Union. The Hospital is still negotiating with the Union as to your wages, hours and benefits which include Blue Cross/Blue Shield contributions; therefore, the letter you received should be ignored.

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[9]Shea recalled that about this time, "* * * I had proposed * * * that the Union would drop all of its non-economic proposals in return for the Hospital dropping * * * most of the proposals in their August 10 document." Brown refused.

Shea noted that the Union had "requested that the Hospital continue to pay the same percentage amount * * *" for the unit employees and the Hospital had refused. Cf. G.C. Exh. 18.[10]

10. October 4, 1977:

At this session on October 4 the parties discussed "tuition assistance and benefits during leave of absence." Union representative Shea, as he testified, "said that we would be willing to consider these as part of a money offer." Hospital representative Brown "responded that he didn't want to make a money offer then, but we should take these issues and put them aside and look at them some point later and see if we could come back to them." The Hospital presented "a new proposal on work day." See G.C. Exh. 9. The Union, by this session, "had made a counterproposal to the Hospital about work day, indicating that [it] would agree to some definition of the work day." Further, by the end of this session, the Hospital and the Union had agreed tentatively "on the compensatory day for holiday proposal." And, also by the end of this session, "the Hospital had dropped one of its economic items, relating to pro-rata vacation pay for part timers."

11. October 13, 1977:

At this October 13 session the Hospital presented a revised "call to work" proposal. See G.C. Exh. 11. Union representative Shea recalled that the Hospital negotiator said "that the procedures used and benefits received by the unit employees should be the same as those provided [for] and received by non-unit people." The "parties discussed how this procedure

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[10]On the following day, October 4, the Union commenced picketing and passing out leaflets at the Hospital. See, e.g., R. Exhs. 8 and 9.

could affect employees' income." There was also a discussion pertaining to "staffing in the bargaining unit" and the Hospital's "leave of absence proposal."[11]

In addition, as counsel for the Hospital notes in his brief (pp. 20-21), by October 13 the Union had learned of the wage increases recently granted to non-unit employees. Shea was asked at the hearing, "was this an amount that was acceptable to the Union?" Shea responded: "It wasn't — it hadn't been offered to us." Further, the Union, as Shea acknowledged, "did not request the Hospital at this October 13 meeting to put the same percentage increase into effect for the Union or unit employees * * *."[12]

12. October 20, 1977:

At the October 20 session the "Hospital presented * * * still another proposal on the call to work issue * * *." As Union representative Shea recalled,

> I [Shea] * * * said that we'd be willing to discuss [a reduction in their call to work proposal] in the context of an overall economic offer from the Hospital, in response to our economic proposals.

And, Hospital representative Topham, after reviewing his notes for this session (G.C. Exh. 26), acknowledged that Hospital spokesman Brown had said:

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[11] The Hospital's "position" was that its proposal on leave of absence "was merely a restatement of the current policy."

[12] Shea noted that: "I believe it was the April 3, 1978, session, when the Union said it would accept the wage proposal that the Hospital had offered with a difference on the effective date" — the "difference was the item of retroactivity."

* * * Am not willing and will not be willing to negotiate economics before language is put to bed * * *.[13]

13. November 2, 1977:

Prior to the session on November 2, the Union had distributed a leaflet at the Hospital asserting that "Management refuses to make us an offer" and is "insisting that we agree to give up a number of benefits which we won in earlier contracts * * *." The leaflet refers to, *inter alia*, "a strike" or "drastic action" in the absence of "some money offer from the Hospital soon* * *." R. Exh. 21. Thereafter, at the November 2 session, the Hospital, according to Union representative Shea, presented "a revision" of its initial proposals. See G.C. Exh. 13.

Shea summarized the Hospital's November 2 "revision," in part as follows:

* * *

> It covered the Hospital's — a revision of the Hospital's original proposal to us relative to probation, a revision of the Hospital's original proposal to us relative to payment of premium pay when an employee was called to work. It incorporated the agreements we had reached on the example of pyramiding and the agreements in substance that we had reached on the prohibition on work other than that assigned by supervisors or a department head. It included the Hospital's proposal on the definition of the work day. It included a version of the Union's proposal on a compensatory day off when holidays were worked. It incorporated the agreement already reached on the

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[13]Topham asserted that "if [he] were to translate [his] notes * * *," he "would replace *wage proposals* and substitute it for the word *economics*."

> proposals to define the year for taking vacation, and to write into the contract the inclusion of shift and weekend differential in vacation pay. And, it proposed the Hospital's proposal on tuition assistance, and the Hospital's proposal on unpaid leaves of absence, and the Hospital's proposal on Union representatives.[14]

In addition, Shea testified that when the Hospital presented its November 2 proposal (G.C. Exh. 13), the Hospital did not state that it was "at the same time rejecting the rest of the Union's proposals — economic and non-economic." However, as counsel for General Counsel notes in his brief (p. 11), "this [November 2] proposal contained no counterproposals to the Union's [earlier] proposals on wages and benefits." Shea recalled that at this session Hospital representative Brown commented, "the longer negotiations went on without agreement then the more likely it was that the Hospital would make proposals to change benefits in the contract" — "* * * there would be more proposals to reduce benefits, more than was already on the bargaining table."

14. November 3, 1977:

Union representative Shea testified that on or by this November 3 session "we had worked out a reasonable compromise" on the Union's compensatory day for holiday worked proposal,

> but [the proposals] were offered by each side * * * as part of a whole trade involving other items and since the

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[14]Shea acknowledged that this proposal had "dropped * * * some of the items which the Union had refused to agree to * * *."

whole trade didn't fly, they were sort of held as basically agreed upon * * *.

Shea acknowledged that "there was some progress, some agreement, as to probation" and "work day", noting that "there were several trades offered * * * through the mediator." On "work day", the Hospital "finally agreed to" the Union's "request that any time they worked over eight they would be paid time and a half."

15. November 15, 1977:

Union representative Shea testified that at this November 15 session the mediator "delineated" the "open issues," "aside from wages and benefits", as:

1. tuition assistance
2. leave of absence,
3. call to work, and
4. Union representative.

Shea would also include as "open issues" the "compensatory day" and "probation" items "because previously the indication that these could be solved [was] in the context of a trade" and consequently "they were still on the table but more settable than the other four."

The Union's "position" as to the Hospital's "leave of absence propsoal [sic]" was "that while we [the Union] could accept some of what the Hospital was asking in its proposal * * * we could not accept the entire position * * *"; "* * * we [the Union] wanted to maintain the payments of health insurance premiums * * *; we would concede on the life [insurance]

* * *." The Union's "position" on the Hospital's proposal pertaining to the "Union representative" was:

> The Union had offered to go some of the way on that issue, that is to restrict in some fashion the Union representative's access to the Hospital, restrict it compared to the old contract position.

The Union, however, "could not agree to the Hospital's proposal * * * to restrict access to [a] Union representative only to situations where a scheduled meeting with an administrative agent had been made." Under the prior agreement, according to Shea, the Union representative "had access to meet with members of the bargaining unit and the stewards in the cafeteria."

Further, the Union's "position" on the "call to work proposal" was,

> we [the Union] would consider dropping the provisions * * * in the existing contract language that called for the payment of double time when an employee was called to work * * * dependent on the Hospital's wage offer and * * * benefit offer * * *. [We] would consider dropping the double time if there were sufficient wage and benefit offers from the Hospital.[15]

The Union, as Shea explained, "was still waiting a counterproposal from the Hospital on its wage and benefit proposals."

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[15] The Union also "was willing to accept a situation where we could change the hours of notice that would trigger payment of time and a half."

16. November 16, 1977:

Union representative Shea testified that no "agreements" were "reached" at this session; the "Hospital was going on and continuing to refuse to make an economic offer"; and the mediator suspended negotiations at the end of the day. Hospital associate director Topham, after reviewing his notes for this session, acknowledged that Hospital spokesman Brown stated at this session: "Very serious thing we're looking down the barrel at. Can't discuss economics without clearing up other items." As noted, the Union filed an unfair labor practice charge on November 28, 1977, and an unfair labor practice complaint issued on January 5, 1978.[16]

17. February 1, 1978:

Union representative Shea testified that negotiations resumed on February 1 "after we had served a 10-day [strike] notice on the Hospital" (R. Exh. 29); the "mediator called us together"; the "Union requested that the Hospital make us a whole economic offer"; and

> Mr. Brown replied that he wanted — he would prefer if we would try to resolve some of the issues before us.

The Hospital made no counterproposal on wages or economics. The Hospital, however, withdrew its proposal on "tuition assistance." The Hospital would therefore "keep the tuition assistance provision as it had in the prior contract." The parties also discussed, *inter alia*, "call to work."[17]

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[16]Negotiations broke off at this point. The Union continued to leaflet the Hospital. See R. Exh. 26. The Union did not request a resumption in negotiations during this period. Shea acknowledged "that plans were made to conduct a work stoppage at the Hospital." See R. Exhs. 27 and 28.

[17]The Union notified the Hospital on February 3 that the one-day work stoppage scheduled for February 4 was changed to February 6. See R. Exhs. 31 and 32. Also see R. Exh. 37. Members of the unit struck on this date. See R. Exh. 33.

18. March 22, 1978:

Union representative Shea testified that the parties next met on March 22. The Hospital presented a "document" (G.C. Exh. 14) which, in effect, "proposed to the Union the same wage and economic benefits that it had granted to the non-unit employees * * *" some six months earlier. This was, as Shea explained, "the first whole economic proposal * * * in response to the Union's request for an economic offer." There was "no mention" in the Hospital's proposal "of some of the proposals that had been put forth by the Union." The Hospital

> made it clear to the Union * * * that those items not mentioned in G.C. Exh. 14 had been rejected by the Hospital.

Cf. G.C. Exh. 4 (Union proposal) and G.C. Exh. 14 (Hospital revised proposal).

The Hospital's proposals pertaining to wages and insurance premiums (G.C. Exh. 14) were to be effective following ratification of a contract. Hospital representative Topham was asked at the hearing, "did the Hospital give any reasons for not offering wage retroactivity?" Topham responded: "Yes. * * * *First*, the Union had not agreed to extend the [prior] contract. * * *[That] leads to an administrative dilemma when there's no document of the contract available for the Management to utilize. *Secondly*, there was no request for retroactivity. And, *thirdly*, we felt that it would have an adverse effect on future negotiations. * * * [It] was our feeling at the time that to grant retroactivity would not motivate the Union in future years to negotiate a contract on a timely basis."

Shea recalled that Hospital spokesman Brown stated at this session that "we were facing potentially a very long period of

litigation" — referring to the pending unfair labor practice charges and "another case at the Hospital";[18] that "he [Brown] had thought it was best that all other items got cleared up before any wage offer was made but the Hospital had reconsidered its position because it was so concerned that employees were suffering because of this situation"; and that

> one of the bases of making the proposal was that the * * * unit [employees] would be receiving through it approximately the same increase that non-Union employees had received last October 1.

Further, Brown made clear "that it was not a question of the Hospital's inability to [pay] * * *. He [Brown] said he was not raising inability to pay" as a reason for not granting retroactivity. Brown "indicated that the Hospital had no intention of including retroactivity in the contract."

Shea stated to Brown "that the Union certainly had no intention of signing a contract that would leave the members our Union [sic] * * * getting the same raise as everybody else in the Hospital, only six months late." Shea recalled that "retroactivity" had been discussed "in the later fall negotiating sessions, or at least one of them" and "in the previous negotiating meeting on February 1 * * *." During those earlier sessions, Shea had stated: "when there was an offer" or "if and when there was an offer from the Hospital on wages and benefits, it certainly better or should be retroactive." Shea finally apprised the Hospital on March 22 that "we wish to consider it

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[18] See *South Shore Hospital*, 229 NLRB 363 (April 29, 1977), enf'd in part, 97 LRRM 3004 (C.A. 1, February 28, 1978). The Court sustained the Board's finding that the Hospital had discharged an employee because of her "open and continuing Union organizing activities."

[the Hospital's proposal] among the membership before giving a full response."[19]

19. March 30, 1978:

Union representative Shea testified that at this March 30 meeting the Union "made a full counterproposal" to the "Hospital's proposal" of March 22. The Union proposed an across-the-board wage increase effective October 1, 1977, in the amount of 8½ percent; a shift differential and adjustment in the minimum to maximum range in pay scale; the Hospital should pick up an increased amount of the family health insurance premium and dental insurance should be included in an employee paid plan; vacations should be increased; minimum time for payment of relief and [sic, should be "in"] higher classification should be increased; and the Union's "last position" on leave of absence, call to work and Union representative access should be accepted. The Union "would forgo [sic] [its] other [prior] proposals" — the "rest should be dropped." Shea made clear that "we were not about to settle the contract without retroactivity * * *."[20]

According to Shea, Hospital spokesman Brown responded by expressing "his disappointment in the Union proposal" and asking "if we [the Union] honestly expected that the Hospital ever intended to give this bargaining unit more money than the rest of the house received * * *." Brown referred to, *inter alia*, "restrictions the Hospital was under due to the system of setting Hospital rates in the State * * * and how that would effectively prohibit them from * * * giving raises or benefit

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[19] At this meeting, Shea discussed the subjects of unpaid leaves of absence, premium pay involving unscheduled calls to work and Union representative access. Both parties "offered proposals" and "compromises on some of the issues." However, no agreements were reached on these items.

[20] Shea, however, recalled that during the ensuing negotiations he had offered a wage increase effective "*later* than October 1, 1977." See *infra*.

increases * * * to any greater extent than they had budgeted for last fall * * *." However, Brown also stated that the Hospital "had budgeted last fall * * * a wage increase and a benefit increase as they had offered it to us [the Union] and as had been given to the rest of the house." And, according to Hospital representative Topham, the Hospital trustees had approved its budget about September 1977 which then included increases for both unit and non-unit employees — these budgeted increases would have, in effect, been authorized effective at the beginning of the fiscal year in October 1977, subject to bargaining insofar as they pertained to the unit employees. Hospital representative Topham acknowledged, "the budget that had been authorized by the board of trustees was also * * * sufficient to cover an equivalent increase, had the Hospital chosen to grant it, to the unit employees as of October 1, 1977 * * *."

Shea, as he further testified, accused the Hospital of "not offering retroactivity" as "punishment for people being in the Union" because the "money" was "budgeted" and there was no "question of inability to pay." Brown responded that "it was not a punitive position." Further, as Shea recalled,

> we had a discussion on the question of retroactivity. He [Brown] said that it was the Union's decision last fall not to extend the contract. And that was one reason why there was not a retroactive offer on the table. He also said that because of a number of things that had gone on — the length of bargaining, he specified, and other things that had gone on outside of the bargaining room — that there was no retroactive offer being made by the Hospital.

There was discussion and both parties "stood" on their last offers. Another meeting was scheduled for April 3.

20. April 3, 1978:

At this session the parties essentially reviewed and restated their positions. Union representative Shea recalled, *inter alia*, that Hospital spokesman Brown stated:

> it was the Union committee's decision not to extend the contract last fall, when the idea was broached by the Hospital; that the Union could very well have gotten the same offer last fall if they simply had been agreeable to the proposals which the Hospital had on the table; and that given some of the things that had gone on — other things that had gone on in addition to the length of bargaining — * * * the Hospital was not about to offer retroactivity in the position it found itself at this moment.

Shea later "proposed" at this meeting that the Union "would accept the Hospital's wage and benefit offer * * * effective October 1, 1977, or *alternatively*, if the Hospital did not want to pay the money that way, that it would accept an offer of double the Hospital's proposal as of May 1 * * *. And, then, we proposed a second year of the contract with an 8½ percent increase as of October 1, 1978, plus the benefit changes that we had previously mentioned in our last offer, * * * effective October 1, 1978 instead of October 1, 1977." Brown indicated that the Hospital "had no intention of including retroactivity in the contract." Shea asserted that he hoped the Union's proposal "might move the negotiations out of the almost deadlock that they were in, that the offer had obviously failed * * *." Shea wanted to discuss the "situation" with the membership.[21]

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[21] Hospital representative Topham's notes for this session attribute to Hospital spokesman Brown the following comment:

> Reviewed the history of relationship, strike notice, changing, etc. To say now we're being punitive is a little one sided.

21. April 18, 1978:

The parties met again on April 18. Prior positions were restated. Brown was not present. Sibley Reppert, an attorney associated with counsel for the Hospital, was present. Shea recalled that at this session,

> I [Shea] asked if there was any movement in the Hospital's position. Mr. Reppert said no. I said I wanted to make sure that I understand exactly the Hospital's position on retroactivity. So, I asked him why the Hospital was not making an offer on retroactivity. Mr. Reppert said that because of the Union's refusal to extend the contract and things that had gone on since the contract had expired — but, he really didn't want to comment on that he said. He was just here to see what could happen next.[22]

The parties "agreed that we were at an impasse over wages and benefits and Mr. Reppert announced that effective [April 24] that the Hospital would be implementing its last wage and benefit offer." There were no further negotiations.

I credit the testimony of Union representative Shea as detailed above. His testimony is substantiated in part by the testimony of Hospital representative Topham, by the testimony of Union representative William Perreault, and by undisputed documentary evidence of record. Shea testified at length as to the 21 bargaining sessions and related matters. His testimony withstood extended cross-examination. And, relying upon demeanor, he impressed me as a reliable, trustworthy and credible witness. On the other hand, Hospital representative Topham gave testimony on cross-examination

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[22] Reppert did not testify.

which at times was incomplete, unclear and evasive. Insofar as Topham's testimony differs with the testimony of Shea as recited and quoted above, I am persuaded here, on this entire record, that Shea's detailed recollection of the sequence of events is more complete, reliable and trustworthy.[23]

Discussion

General Counsel contends that Respondent Hospital violated Section 8(a)(5) of the National Labor Relations Act by refusing to bargain in good faith with the Union with respect to wages and other economic benefits from about September 15, 1977 to about March 22, 1978. General Counsel asserts (Br. pp. 18-23) that "where negotiations stall, as they did here, because the parties cannot reach agreement on certain non-economic matters and on certain proposals to reduce certain existing benefits or practices, the only way to avoid impasse may be through exploration of the Employer's position on wages and economic matters" and,

> if in these circumstances the Union, as it did here, repeatedly asks the Employer to turn to economic issues, but the Employer, as it did here, repeatedly refuses to talk about them until all the non-economic issues and the Employer's proposals have been settled favorable to the Employer * * *,

the Employer has not fulfilled its statutory bargaining obligation. Further, General Counsel asserts (Br. pp. 23-24) that

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[23] Counsel has filed a "stipulation to amended record." This document proposes certain corrections in the record. The proposed corrections are granted. Counsel has also filed "a joint motion to reopen the record to receive an additional exhibit", G.C. Exh. 1(p)(1). This motion is also granted.

the Employer's conduct from March 22, 1978, during the last four bargaining sessions, "was a continuation of * * * its earlier refusal to bargain in good faith * * *."

Respondent argues (Br. pp. 34-59), *inter alia*, that General Counsel has failed to establish by a preponderance of the evidence that the Hospital violated Section 8(a)(5) of the Act. Respondent contends that the Hospital "never insisted upon agreement by the Union to Hospital proposals"; that "by seeking to postpone discussion of wages and benefits until other issues had been resolved, the Hospital negotiated in good faith in accordance with the past practices of the parties and accepted negotiating techniques"; that "the totality of the circumstances surrounding the negotiations manifests the Hospital's good faith"; that "both parties were engaged in hard bargaining and were jockeying for position * * *"; and that the Hospital did not violate Section 8(a)(5) "by engaging in such hard bargaining."

Section 8(a)(5) of the Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representative of his employees * * *." Section 8(d) provides that "to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment * * *." The pertinent legal principles have been restated many times by the Board and the Courts. Thus, in *N.L.R.B.* v. *Patent Trader, Inc.*, 415 F. 2d 190, 197-198 (C.A. 2, 1970), mod. *en banc*, 426 F. 2d 791 (C.A. 2, 1970), the Court restated these principles and sustained the Board's findings, as follows:

* * *

> [The] Company "entertained no sincere desire and made no genuine effort" to conclude an agreement with the

Union. It is well-settled that the "performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." *N.L.R.B.* v. *American National Insurance,* 343 U.S. 395, 402, 72 S. Ct. 824, 828, 96 L. Ed. 1027 (1952). And although "the obligation of the employer to bargain in good faith does not require the yielding of positions fairly maintained," *N.L.R.B.* v. *Herman Sausage Co.*, 275 F. 2d 229, 231 (5th Cir. 1960), more is required than mere "surface bargaining" or "giving the Union a runaround while purporting to be meeting the Union for purposes of collective bargaining." *N.L.R.B.* v. *Herman Sausage Co., supra,* p. 232, quoting *N.L.R.B.* v. *Athens Mfg. Co.*, 161 F. 2d 8 (5th Cir. 1947). See also *N.L.R.B.* v. *National Shoes, Inc.*, 208 F. 2d 688, 691 (2d Cir. 1953); *N.L.R.B.* v. *Fitzgerald Mills Corporation*, 313 F. 2d 260, 266 (2d Cir. 1963). Whether the Company bargained in good faith normally rests upon "a finding of motive or state of mind which can only be inferred from circumstantial evidence," *N.L.R.B.* v. *Reed & Prince Mfg. Co.*, 205 F. 2d 131, 139-140 (1st Cir.), cert. denied 346 U.S. 887, 74 S. Ct. 139, 98 L. Ed. 391 (1953), and "[t]he previous relations of the parties, antecedent events explaining behavior at the bargaining table, and the course of negotiations [which] constitute the raw facts for reaching such a determination." *Local 833, UAW-AFL-CIO, etc.* v. *N.L.R.B.*, 112 U.S. App. D. C. 107, 300 F. 2d 699, 706, cert. denied *Kohler Co.* v. *Local 833 etc.*, 370 U.S. 911, 82 S. Ct. 1258, 8 L. Ed. 2d 405 (1962).

* * *

The Court, in agreement with the Board, noted that,

"[b]y postponing or removing from the area of bargaining — to the very end of negotiations — most fundamen-

> tal terms and conditions of employment (wages, hours of work, overtime, severance pay, reporting pay, holidays, vacations, sick leave, welfare and pensions, etc.) [the Company] reduced the flexibility of collective bargaining, [and] narrowed the range of possible compromises" with the result of "* * * rigidly and unreasonably fragmenting the negotiations * * *." See *Vanderbilt Products, Inc.* v. *N.L.R.B.*, 297 F. 2d 833 (2d Cir. 1961) (Per Curiam). [footnote omitted.]

* * *

In *The Adrian Daily Telegram*, 214 NLRB 1103, 1110-1112 (1974), the Board similarly found that the employer violated this statutory obligation "by refusing to submit any specific economic counterproposals to the union despite repeated requests by the union, as well as the mediator, and in addition by refusing to bargain with respect to any economic matters until final agreement had been reached on all non-economic issues * * *." Likewise, in *Federal Mogul Corporation*, 212 NLRB 950 (1970), enf'd 524 F. 2d 37 (C.A. 6, 1975), the Board held that the employer's "refusal to submit or discuss or to permit any discussion of economic proposals in the contract negotiations and [its] requirement as a condition for any such discussion that the union agree to accept [its] terms on certain non-economic matters, was a refusal to bargain in good faith * * *." The Court, in agreement with the Board, noted that the

> union * * * had opened the negotiations by stating all of its economic demands except wages. Nonetheless, for a substantial time the union acquiesced in the company's demand to settle non-economic issues first. In the weeks immediately before the strike, however, the union made

a wage proposal and unsuccessfully sought economic proposals from the company.

Also see, *Bartlett-Collins Company*, 230 NLRB 144, 173-175 (1977); *Romo Paper Products Corp.*, 220 NLRB 519, 525 (1975) enf'd 93 LRRM 2336 (C.A. 2, 1976). Of course, as the Supreme Court observed in *N.L.R.B.* v. *American National Insurance Co.*, 343 U.S. 395, 410 (1952), "* * * a statutory standard such as 'good faith' can have meaning only in the application to the particular facts of a particular case * * *."

On the credible evidence of record in this case, as detailed *supra*, I find and conclude that Respondent Hospital violated its statutory obligation to bargain in good faith with the Union by its repeated refusal during the course of some 18 bargaining sessions over an eight-month period to submit to the Union wage or economic counterproposals or to discuss with the Union wages or economic benefits. Respondent Hospital, during this extended period, persistently and adamantly refused to bargain in good faith with the Union over wages and economic benefits which had been proposed by the Union unless and until the Union agreed to reductions in certain existing employee benefits as proposed by the Hospital. Respondent Hospital, by its conduct, was not dealing with the Union "in a serious attempt to resolve [their] differences and reach a common ground." *N.L.R.B.* v. *Insurance Agents' Union*, 361 U.S. 477, 485, 486 (1960). Instead, as discussed below, the Hospital was "rigidly and unreasonably fragmenting the negotiations * * *" and "giving the Union the runaround while purporting to be meeting with the Union for purposes of collective bargaining." *N.L.R.B.* v. *Patent Trader, Inc.*, *supra*.

Thus, by the first bargaining session on July 20, the Union had submitted to the Hospital a full proposed contract including wages and other economic benefits as well as non-

economic benefits. The Union, in turn, requested a full counterproposal from the Hospital. At the second session on August 10, the Hospital submitted its proposals. However, the Hospital's proposals did not contain substantive provisions pertaining to wages and economic benefits as included in the Union's submission. The Hospital's proposals provided in significant part for reductions in existing employee benefits. Hospital representative Topham "wanted to get resolution of these proposals prior to the introduction of [its] wage proposal." The Union, at this early bargaining session, generally agreed "to get the non-economic items out of the way * * *"; however, the Union also made clear that "it may well become necessary to mix non-economic items and economic items before resolution of the non-economic items." No time limitation was established for this procedural arrangement.

Thereafter, by the fifth session on September 16, the Hospital had responded to the Union's initial proposals by, for the most part, rejecting the Union's proposals or setting them aside as "economic." The negotiations then focused primarily on the Hospital's proposals. The Union nevertheless manifested its willingness to compromise on various of the Employer's proposals and offered counterproposals. Some limited agreement was reached. However, as Union representative Shea recalled, the Union again requested "an entire economic proposal" from the Hospital by the September 16 session because "negotiations had bogged down with the Hospital insisting that * * * the Union give up certain existing benefits." The Union "felt that it was not possible for [it] to consider the proposals that the Hospital was making any further without seeing their whole economic offer." The Hospital refused to make such an economic offer or counterproposal. Nevertheless, as Shea further explained, the Union

still continued to discuss the Hospital's proposals and possible compromises "to the reductions in benefits * * * requested by the Hospital."

Subsequently, at the sixth session on September 21, the Hospital again refused to make an economic proposal to the Union even though a federal mediator was present. About this same time, the Hospital granted to its non-Union employees a general wage increase ranging from 3 to 8.3 percent and absorbed an increase in insurance premium costs to be charged these employees. The Hospital notified the Union employees that a

> letter which you received recently regarding an increase in the Hospital's contribution [for the insurance] coverage was only meant for employees *not* represented by the Union. The Hospital is still negotiating with the Union as to your wages, hours and benefits which include [the insurance] contributions * * *.

The collective bargaining agreement applicable to the unit employees expired on September 30.

Thereafter, at the ninth session on October 3, the Union "again asked the Hospital to make us a whole economic offer * * *; we weren't getting anywhere without such an offer on the table * * *; the Union could not consider any further compromises on the Hospital's demands * * *." The Hospital again refused. The Union proposed dropping "all of its non-economic proposals" in return for the Hospital dropping "most of the proposals in their August 10 proposal." The Hospital refused. Later, at the tenth session on October 4, the Union proposed that "we would be willing to consider" the Hospital's proposed tuition assistance and leave of absence items "as part of a money offer." The Hospital "didn't want to make a money offer then * * *."

At the twelfth session on October 20, the Union proposed that it would be willing to discuss a reduction in the call to work item "in the context of an overall economic offer from the Hospital, in response to [the Union's] economic proposals." Hospital spokesman Brown made clear that he "will not be willing to negotiate economics before language is put to bed * * *." Later, at the thirteenth session on November 2, Brown warned Shea:

> the longer the negotiations went on without agreement, then the more likely it was that the Hospital would make proposals to change benefits in the contract.
>
> * * *
>
> There would be more proposals to reduce benefits, more than was already on the table.

The parties broke off negotiations in November. The Union filed unfair labor practice charges. The initial complaint issued in this case and the matter was scheduled for hearing. Meanwhile, the mediator called the parties together for their seventeenth session on February 1. The Union again requested a "whole economic offer." The Hospital again refused.

However, at the eighteenth session on March 22, the Hospital offered to the Union the same wage and economic benefits which it had granted to the non-Union employees some six months earlier. See G.C. Exh. 14. This was, as Shea noted, the "first whole economic proposal * * * in response to the Union's request for an economic offer." There was no mention in this proposal of some of the proposals which previously had been made by the Union. The Hospital made clear that those items not mentioned in G.C. Exh. 14 "had

been rejected." In addition the Hospital refused to make its wage and economic proposals retroactive to October 1, 1977. Hospital spokesman Brown apprised the Union representative that "the Hospital had no intention of including retroactivity in the contract." Brown, at the same time, noted that he was not claiming "inability to pay" as a reason for not granting retroactivity. And, Hospital representative Topham acknowledged that "the budget" which had been approved by the trustees some seven months earlier included wage and benefit increases for both unit and non-unit employees — "the budget that had been authorized * * * was also * * * sufficient to cover an equivalent increase had the Hospital chosen to grant it to the unit employees as of October 1, 1977 * * *." Brown subsequently explained to Shea, "* * * the Union could very well have gotten the same offer last fall if they simply had been agreeable to the proposals which the Hospital had on the table * * *."

Union representative Shea stated at the March 22 session, and during the course of the remaining three sessions on March 30, April 3 and April 18, "that the Union certainly had no intention of signing a contract that would leave the members of our Union * * * getting the same raises as everybody else in the Hospital only six months late." Nevertheless, during these sessions, Shea also made a full counterproposal to the Hospital's March 22 offer. Shea proposed an alternative to retroactivity to October 1, 1977, with increased benefits. Brown, however, "had no intention of including retroactivity in the contract" and the Union's proposed alternative was unacceptable.

I find and conclude on this record that from about September 16, 1977 to about March 22, 1978, Respondent Hospital refused to bargain with the Union over wages and other economic benefits which were proposed by the Union unless and until the Union agreed to reductions in certain existing benefits as proposed by the Hospital. Respondent Hos-

pital's conduct was incompatible with its obligation to bargain in good faith. Thereafter, commencing March 22, Respondent Hospital persisted in its refusal to bargain in good faith, effectively rejecting any attempt by the Union to "move the negotiations out of the almost deadlock they were in * * *." Respondent Hospital thereby violated Section 8(a)(5) and (1) of the Act.

The issue remains, whether Respondent Hospital, by its conduct, also violated Section 8(a)(3) and (1) of the Act. General Counsel argues in support of this allegation (Br. pp. 25-27) that Respondent Hospital,

> by granting wage increases to non-unit employees while it was refusing to bargain in good faith with the Union with respect to wages and by thereafter refusing to grant retroactive wage increases to unit employees, unlawfully withheld wage increases from unit employees from on or about September 26, 1977 to on or about April 24, 1978, in violation of Section 8(a)(3) and (1) of the Act.[24]

Respondent contends (Br. pp. 59-79) that the Hospital did not violate Section 8(a)(3) "by withholding a wage increase from bargaining unit employees."

In *Shell Oil Company, Inc.*, 77 NLRB 1306, 1310 (1948), the Board stated in pertinent part:

* * *

> *Absent an unlawful motive*, an employer is privileged to give wage increases to his unorganized employees at a time when his other employees are seeking to bargain collectively through a statutory representative. Likewise, an employer is under no obligation under the Act to make

---

[24]The complaint, as amended, alleges this discriminatory withholding to be from on or about October 1, 1977 to on or about April 24, 1978.

> such wage increases applicable to union members in face of collective bargaining negotiations on their behalf involving much higher stakes * * * [footnote omitted].

The Board found in *Shell Oil* that the employer had not refused to bargain in good faith and, further, had not discriminated against its employees by withholding certain wage increases. More recently, in *B. F. Goodrich Co.*, 195 NLRB 914 (1972), the Board quoted from the *Shell Oil* rationale and concluded:

> The granting of a new profit sharing plan to unorganized employees but not to represented employees is not, standing alone, prohibited discrimination [footnote omitted].

The Board noted that the employer's "unlawful refusal to bargain did not create any obligation automatically to grant the identical benefit to the represented employees * * *."

A similar issue was also raised in *Chevron Oil Company*, 182 NLRB 445 (1970), enforcement denied 442 F. 2d 1067 (C.A. 5, 1971). There, the Board found that the employer had failed to negotiate in good faith in violation of Section 8(a)(5) of the Act and, in addition, had violated Section 8(a)(3) of the Act by "withholding from the unit employees involved * * * wage increases and improved benefits that it granted to other employees." As the Board noted, the union, "following the impasse, had sought to have respondent put into effect retroactively for these employees, without contract, the wage-benefit increases it had earlier granted its unrepresented employees and offered the union. Respondent refused * * *." The Board stated:

> Were it not for the unfair labor practice setting in which the withholding action occurred, we would have no hesi-

> tancy in adoping the trial examiner's finding [dismissing the allegation.] It has long been an established Board principle that, in the context of good faith bargaining, and absent other proof of unlawful motive, an employer is privileged to withhold from organized employees wages increases granted to unorganized employees or to condition their grant upon final contract settlement [citations omitted.] * * *

The Board, in finding a Section 8(a)(3) violation in *Chevron Oil*, reasoned:

* * *

> The union could either capitulate to respondent's bad-faith bargaining position, and thereby abdicate in large measure its statutory role as an employee representative, or it could remain without any contract at all while the unit employees continued to suffer the loss of benefits being enjoyed by other employees and which would have been theirs also had they not voted in the union. Whichever path the union chose, it could only lead to undermining it in the eyes of employees as an effectual employee representative. As the respondent's withholding action was thus an integral part of its unlawful course of conduct, it must also be viewed as repugnant to statutory policy, and therefore cannot be justified as conduct serving legitimate interests of respondent. [footnote omitted.]

The Fifth Circuit denied enforcement of the Board's order with respect to its bad faith bargaining and discriminatory withholding of wage findings. The Court stated in pertinent part:

> We have determined that the Board's finding that the company's withholding action occurred within a bad faith bargaining context is not supported by substantial evidence on the record as a whole. It follows that the company was within permissible bounds in refraining from granting the benefits to the union represented employees in the absence of agreement [citations omitted].
>
> * * *

Applying these principles to the facts of this case, I find and conclude that Respondent Hospital's withholding of the wage increases from the Union employees was in substantial part discriminatorily motivated and, consequently, violative of Section 8(a)(3) and (1) of the Act. The Hospital, during the course of some 18 bargaining sessions, acting in bad faith, had refused to submit to the Union wage and economic counterproposals and had refused to discuss with the Union wages and economic benefits. However, at the eighteenth bargaining session, some eight months after bargaining had commenced, the Hospital offered to the Union the same wage and economic benefits which it had granted to the non-Union employees six months earlier without retroactivity. The Hospital, at the same time, persisted in its bad faith conduct by making clear to the Union that it would not grant retroactivity under any circumstances and by dismissing further counterproposals from the Union.

Hospital spokesman Brown had warned Union representative Shea during the thirteenth bargaining session on November 2,

> * * * the longer negotiations went on without agreement then the more likely it was that the Hospital would make proposals to change the benefits of the contract
> * * * there would be more proposals to reduce benefits, more than already was on the table.

At the same time, the Hospital, by refusing to bargain in good faith, made it impossible for the Union, in fulfilling its role as statutory bargaining agent for the unit employees, to conclude such an agreement. Thereafter, when the Hospital finally offered to the Union the economic benefits previously granted to the non-union employees without retroactivity, Brown made clear to the Union representative that the Hospital was not claiming any "financial inability to grant retroactivity"; the Hospital had budgeted such increases months earlier for both Union and non-union employees; and "the Union could very well have gotten the same offer last fall if they simply had been agreeable to the proposals which the Hospital had on the table * * *." Brown also cited the Union's failure to extend the contract "when the idea was broached by the Hospital"; "the length of the bargaining"; and "other things that had gone on in addition to the length of bargaining * * *."

I am persuaded here that Respondent Hospital, in refusing to grant the retroactive wage increases to the Union employees, was motivated in substantial part by a desire to punish the unit employees because they had chosen Union representation. As the Board stated in *Chevron Oil, supra*, "the wage benefit withholding in the instant case * * * was used by Respondent in the service of designs inimical to the process of collective bargaining. The foreseeable and clearly intended effect of the withholding was to confront the Union with a Hobson's choice: The Union could either capitulate to Respondent's bad faith bargaining position, and thereby abdicate in large measure its statutory role as an employee representative, or it could remain without any contract at all while the unit employees continued to suffer the loss of benefits being enjoyed by other employees and which would have been theirs had they not voted in the Union. Whichever path the Union chose, it could only lead to undermining it in the eyes of the employees as an effectual employee representative * * *."

In sum, here, the Employer's withholding action was an integral part of its unlawful course of conduct. It cannot be justified as serving any legitimate interests of the Employer. This discriminatory conduct plainly had a natural and foreseeable effect of chilling employee desires for Union representation. Such conduct was intended to punish the unit employees because they had selected Union representation. Respondent Hospital therefore violated Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. Respondent Hospital is an employer engaged in commerce within the meaning of the Act.

2. Charging Party Union is a labor organization within the meaning of the Act.

3. Respondent Hospital has violated Section 8(a)(5) and (1) of the Act from about September 16, 1977 to about March 22, 1978, by refusing to bargain with Charging Party Union as the exclusive bargaining agent of its employees in the following appropriate unit over wages and other economic benefits which were proposed by the Union unless and until the Union agreed to reductions in certain other existing benefits as proposed by the Respondent, and, in addition, from about March 22, 1978, by refusing to bargain in good faith with the Union with respect to wages. The appropriate bargaining unit is:

> all full-time, permanent part-time and part-time employees of Respondent at its Weymouth facility employed as xray [sic] technologists, nuclear technologists, laboratory technicians, laboratory technologists, respiratory therapists, respiratory therapy technicians, physicial therapy assistants, operating room technicians, ekg technicians, orthopedic technicans and pharmacy

technicians, *but excluding* all licensed practical nurses, registered nurses, professional employees, clerical employees, all students, temporary and casual employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

4. Respondent Hospital violated Section 8(a)(3) and (1) of the Act by discriminatorily withholding from the above unit employees from about October 1, 1977 to about April 24, 1978, the wage increases which were granted non-unit employees, in order to discourage their membership in Charging Party Union.

5. The unfair labor practices found above affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

In order to remedy the unfair labor practices found herein and to effectuate the purposes of the Act, Respondent Hospital will be directed to cease and desist from engaging in the conduct found unlawful; to cease and desist from in any other manner interfering with employee Section 7 rights; and to post the attached notice. Further, Respondent Hospital will be directed, upon request, to bargain collectively and in good faith with Charging Party Union as the exclusive bargaining agent of its employees in the unit described above and if an understanding is reached to embody such understanding in a signed agreement. In addition, Respondent Hospital will be directed to make whole the unit employees for any monetary losses they may have suffered as a result of the Employer's discriminatory withholding of the wage increases, as found herein, from on or about October 1, 1977, to on or about April 24, 1978, with interest thereon to be computed in the manner

prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), and *Florida Steel Corporation*, 231 NLRB 651 (1977). See, generally, *Isis Plumbing & Heating Co.*, 138 NLRB 716 (1962). Cf. *Chevron Oil Co., supra*, 182 NLRB at 450-451.[25]

Order[26]

Respondent South Shore Hospital, its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Failing or refusing upon request to bargain collectively and in good faith with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment with Mass. Hospital Workers Union, Local 880, S.E.I.U., AFL-CIO, as the exclusive bargaining agent of the employees in the unit described below, by refusing to bargain with the Union over wages and other economic benefits which were proposed by the Union unless and until the Union agreed

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[25] Counsel for Respondent argues that the Board is without the authority to grant "a retroactive order like that issued in *Chevron* * * *", citing *inter alia*, *H. K. Porter Co.* v. *N.L.R.B.*, 397 U.S. 99 (1970). Here, unlike in *H. K. Porter*, the Board is not compelling agreement to substantive terms of a contract, but instead remedying the Employer's discriminatory conduct, the discriminatory withholding of a wage increase, in violation of Section 8(a)(3) of the Act.

[26] In the event no exceptions are filed as provided by Section 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein shall, as provided in Section 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.

to reductions in certain existing benefits as proposed by the Hospital and by refusing to bargain in good faith with the Union with respect to wages. The appropriate bargaining unit is:

> all full-time, permanent part-time and part-time employees of Respondent at its Weymouth facility employed as xray [sic] technologists, nuclear technologists, laboratory technicians, laboratory technologists, respiratory therapists, respiratory therapy technicians, physical therapy assistants, operating room technicians, ekg technicians, orthopedic technicians and pharmacy technicians, but excluding all licensed practical nurses, registered nurses, professional employees, clerical employees, all students, temporary and casual employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act;

(b) Discouraging membership in said Union, or in any other labor organization, by discriminatorily withholding from the above unit employees from on or about October 1, 1977 to on or about April 24, 1978, wage increases which were granted to its non-unit employees;

(c) From in any other manner interfering with, restraining or coercing employees in the exercise of their Section 7 rights.

2. Take the following affirmative action necessary to effectuate the purposes of the Act:

(a) Upon request bargain collectively and in good faith with said Union as the exclusive bargaining agent of its employees in the above unit with respect to rates of pay, wages, hours of work, and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement;

(b) Make whole the employees in the unit found appropriate for any monetary losses they may have suffered as a result of the Hospital's discriminatory withholding of the wage increases granted to its non-unit employees as provided in this Decision;

(c) Preserve and make available to the Board, upon request, all payroll records and reports, and all other records necessary and useful to determine the amount of backpay due under this Decision;

(d) Post at its facility in Weymouth, Massachusetts, copies of the attached notice marked "Appendix."[27] Copies of said notice, on forms provided by the Regional Director for Region 1, after being duly signed by the Respondent's representative, shall be posted by the Respondent immediately upon receipt thereof and be maintained by it for 60 consecutive days thereafter in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced or covered by any other material;

---

[27] In the event that the Board's Order is enforced by a Judgment of a United States Court of Appeals, the words in the notice reading "POSTED

(e) Notify the Regional Director for Region 1 in writing within 20 days from the receipt of this Decision what steps have been taken to comply herewith.

Dated, Washington, D. C. May 14, 1979

Frank H. Itkin
Administrative Law Judge

BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall be changed to read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

Appendix

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

AN AGENCY OF THE UNITED STATES GOVERNMENT

AFTER A FULL TRIAL IN WHICH BOTH SIDES HAD THE OPPORTUNITY TO PRESENT THEIR EVIDENCE, THE NATIONAL LABOR RELATIONS BOARD HAS FOUND THAT THE SOUTH SHORE HOSPITAL HAS VIOLATED THE NATIONAL LABOR RELATIONS ACT AND HAS ORDERED US TO POST THIS NOTICE. WE THEREFORE NOTIFY YOU THAT:

WE WILL NOT fail or refuse upon request to bargain collectively and in good faith with respect to rates of pay, wages, hours of employment, and other conditions of employment with Mass. Hospital Workers Union, Local 880, S.E.I.U., AFL-CIO, as the exclusive bargaining agent of our employees in the unit described below, by refusing to bargain with the Union over wages and other economic benefits which were proposed by the Union unless and until the Union agreed to reductions in certain existing benefits as proposed by us, and by refusing to bargain in good faith with the Union with respect to wages. The appropriate bargaining unit is:

all full-time, permanent part-time and part-time employees of Respondent at its Weymouth facility employed as xray [sic] technologists, nuclear techno-

logists, laboratory technicians, laboratory technologists, respiratory therapists, respiratory therapy technicians, physical therapy assistants, operating room technicians, ekg technicians, orthopedic technicians and pharmacy technicians, *but excluding* all licensed practical nurses, registered nurses, professional employees, clerical employees, all students, temporary and casual employees, managerial employees, guards and supervisors as defined in Section 2(11) of the Act.

WE WILL NOT discourage membership in said Union, or in any other labor organization, by discriminatorily withholding from the above unit employees, wage increases which were granted to our employees who are not in the above unit.

WE WILL NOT in any other manner interfere with, restrain or coerce our employees in the exercise of their rights guaranteed in Section 7 of the National Labor Relations Act.

WE WILL upon request bargain collectively and in good faith with said Union as the exclusive bargaining agent of our employees in the above unit with respect to rates of pay, wages, hours of work and other terms and conditions of employment and if an understanding is reached embody such understanding in a signed agreement.

WE WILL make whole our employees in the above unit for any monetary losses they may have suffered as a result of our discriminatory withholding of wage increases granted to our non-unit employees as provided in the Board's Decision.

SOUTH SHORE HOSPITAL

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board's Office,

Keystone Building -
12th Floor, 99 High Street, Boston, Massachusetts 02110,
Tel. No. (617) 223-3313.

United States Court of Appeals
For the First Circuit

No. 79-1590.

SOUTH SHORE HOSPITAL,
PETITIONER,

v.

NATIONAL LABOR RELATIONS BOARD,
RESPONDENT.

Decree

ENTERED SEPTEMBER 18, 1980

This cause came on to be heard on Petition for Review of an Order of the National Labor Relations Board, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The petition for review is dismissed and the order of the National Labor Relations Board is hereby affirmed and enforced.

By the Court.
/s/Dana H. Gallup
Clerk.

No. 80-920

In the Supreme Court of the United States

OCTOBER TERM, 1980

SOUTH SHORE HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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In the Supreme Court of the United States

OCTOBER TERM, 1980

No. 80-920

SOUTH SHORE HOSPITAL, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

QUESTION PRESENTED

Whether the Board properly found that petitioner violated Section 8(a)(3) of the National Labor Relations Act by denying to union-represented employees improvements in wages and benefits granted to unrepresented employees in order to punish them for selecting union representation, and properly ordered petitioner to make the employees whole for the discrimination against them.

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Statute:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 630 F. 2d 40. The decision and order of the Board (Pet. App. 14a-74a) is reported at 245 N.L.R.B. No. 110.

JURISDICTION

The judgment of the court of appeals (Pet. App. 75a) was entered on September 18, 1980. The petition for a writ of certiorari was filed on December 5, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE INVOLVED

The relevant portions of the National Labor Relations Act are set forth at Pet. 2-4.

STATEMENT

Following a hearing before an Administrative Law Judge, the Board found that petitioner ("the Hospital") violated Section 8(a)(5) and (1) of the Act, 29 U.S.C. 158(a)(5) and (1), by refusing, from about September 16, 1977 to March 22, 1978, to bargain over wages and other economic benefits unless and until the Union,[1] the representative of an appropriate unit of Hospital employees, agreed to reductions in certain other existing benefits, and, in addition, by refusing after March 22, 1978, to bargain in good faith with respect to wages (Pet. App. 60a-61a). The Board also found that the Hospital violated Section 8(a)(3) and (1) of the Act by discriminatorily withholding from unit employees, from October 1, 1977 to about April 24, 1978, the wage increases and insurance premium benefit which had been granted to non-unit employees, in order to discourage the unit employees' membership in the Union (Pet. App. 66a-67a). The Board's order requires the Hospital,

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[1]Massachusetts Hospital Workers Union, Local 880, Service Employees International Union, AFL-CIO.

inter alia, to bargain in good faith with the Union upon request, to embody any understanding reached in a signed agreement, and to make the unit employees whole for losses suffered by reason of the discrimination found to have been committed against them (*id.* at 67a-70a). The court of appeals upheld the Board's decision and enforced its order (Pet. App. 1a-13a).

The Hospital here challenges only the Board's finding that the refusal to grant the retroactive wage increase and insurance premium benefit violated Section 8(a)(3) of the Act, and the Board's order requiring the Hospital to make the employees whole for that violation. The relevant facts are these:

1. The Union represents a unit of technical employees, who comprise approximately 100 of the Hospital's 1,200 employees and are the only ones represented by a union (Pet. App. 2a, 22a). Negotiations for a new contract began in July, 1977; twenty-one bargaining sessions were held over the ensuing nine months, but no agreement was reached (*id.* at 2a, 23a, 51a).

In September 1977, the Hospital budgeted increases for all its employees, including unit members. The increases were implemented on October 1, 1977, for all employees except those represented by the Union (Pet. App. 2a, 11a n.4, 37a, 60a). Nevertheless, the Hospital's negotiators insisted until March, 1978, that they would not discuss raises for unit employees until the Hospital's demands for changes in the contract were resolved. When the Hospital finally abandoned this position on March 22, 1978, it offered the budgeted raise to the Union, but flatly refused to make it retroactive, thereby permanently putting unit employees six months in arrears of the other employees who had received the raise on October 1 (*id.* at 3a, 46a-47a).

Hospital spokesmen explained that their refusal to consider retroactivity was not based on economic considera-

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tions, because allowance the full pay raise had been made in the budget (Pet. App. 11a, 47a, 49a; Tr. 113, 117).[2] A Hospital spokesman asserted that retroactivity was being denied because of "the Union's decision last fall not to extend the contract[,] * * * the length of bargaining, * * * and other [unspecified] things that had gone on outside of the bargaining room" (Pet. App. 49a; Tr. 119). The spokesman further asserted that the Hospital would have made its wage offer "last fall, if [the Union] simply had been agreeable to the proposals which the Hospital had on the table" (Pet. App. 50a; Tr. 122). Another Hospital spokesman explained that "to grant retroactivity would not motivate the Union in future years to negotiate a contract on a timely basis" (Pet. App. 46a).

The Administrative Law Judge, whose decision was adopted by the Board, found that the denial of retroactivity "cannot be justified as serving any legitimate interests of the [Hospital], * * * [and] plainly had a natural and foreseeable effect of chilling employees' desires for Union representation" (Pet. App. 66a). He noted that, although the Hospital contended that its actions were designed to procure a swift conclusion to the negotiations, it was the Hospital's refusal to bargain in good faith that prolonged the negotiations (*id.* at 64a-65a). He concluded that the Hospital's refusal "was motivated in substantial part by a desire to punish the unit employees because they had chosen Union representation" (*id.* at 65a).

2. The court of appeals agreed with the Board that the Hospital had not established any legitimate reason for denying to the unit employees the benefits granted to the non-union employees. The court stated (Pet. App. 11a-13a; footnotes omitted):

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[2]"Tr." references are to the transcript of the hearing before the Board.

The Hospital made it clear during negotiations, and does not now deny, that inability to pay was not the reason for its refusal to make its wage offer retroactive to October 1, 1977. Rather, the Hospital's stated reasons were the Union's refusal in September 1977 to extend the existing collective bargaining contract—which refusal held open the threat of a Union strike and led to the administrative dilemma of having no contract to utilize in dealing with employees—and the potential impact of granting retroactivity on future negotiations.

* * * * *

We start with the second alleged justification—the Hospital's desire to discourage needlessly drawn out negotiations. We do not pass on the question whether, after unduly prolonged negotiations during which the employer bargained in good faith, an employer's refusal to extend retroactively to unit employees a wage increase granted similarly situated non-unit employees may be justified by the length of or conduct during bargaining sessions. Here, however, the Board could conclude that it was the Hospital's unlawful piecemeal bargaining strategy, not the Union's conduct, which produced the protracted negotiations. The Hospital cannot invoke its deterrent rule to punish the Union for the Hospital's misconduct.

The Hospital's first justification similarly fails. The Union's refusal to agree to extend the existing contract for any significant length of time occurred while the Hospital's bad faith bargaining strategy was ongoing. The Hospital's alleged dilemma of having no contract to utilize was, in view of its bad faith refusal to make a wages and benefit counterproposal, much of its own making, and blame cannot be shifted to the Union.

Finally, the court rejected the Hospital's assertion, in purported reliance on *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), that the Board's make whole order was in excess of its authority. The court explained (Pet. App. 13a n.7) that:

> The *H. K. Porter Co.* case dealt with the Board's authority to remedy section 8(a)(5) violations. The make whole order here is to remedy a section 8(a)(3) violation. It is a standard type remedy in discrimination cases and does not exceed the Board's authority.

ARGUMENT

Petitioner challenges the Board's finding that the Hospital's refusal to grant the retroactive wage increase and insurance benefit to the unit employees was motivated by antiunion considerations (Pet. 7-13). Petitioner asserts that the finding of antiunion motivation rests upon the Hospital's refusal to grant a concession at the bargaining table—*i.e.*, its refusal to recede from its unlawful insistence that noneconomic issues be resolved before discussing economic issues. Thus, petitioner argues, the Board's finding of a Section 8(a)(3) violation and the order requiring that the unit employees be compensated for the withheld benefits are contrary to Section 8(d) of the Act, which provides that the obligation to bargain "does not compel either party to agree to a proposal or require the making of a concession." This claim rests on an erroneous premise.

Neither the Board nor the court below found that the withholding of benefits violated Section 8(a)(3) of the Act because the Hospital engaged in piecemeal bargaining. Rather, the Section 8(a)(3) violation was based on the Hospital's intention, as revealed in its spokesmen's statements, to punish the unit employees because of the Union's refusal to capitulate to the Hospital's concededly unlawful bargaining procedure. The fact that the Union's conduct at the bargaining table may have prompted the Hospital's antiunion

motivation is irrelevant. Had the Hospital refused to give the unit employees benefits given to unrepresented employees in order to penalize them for having chosen union representation at a time when negotiations for a collective bargaining agreement were not being conducted, the Board unquestionably could have found that the refusal violated Section 8(a)(3) of the Act, and could have prescribed a make whole order. The fact that the Hospital was at the same time engaging in unlawful bargaining tactics does not alter the Board's power to remedy the Hospital's unlawfully motivated treatment of the unit employees.[3]

Petitioner's reliance on *H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), is misplaced. In that case, the employer, for antiunion reasons, refused to agree to a "check-off" clause requiring it to deduct union dues from its wage payments to employees who were union members. The Court, although sustaining the Board's finding that the employer had refused to bargain in good faith in violation of Section 8(a)(5) of the Act, held that Section 8(d) barred the Board from requiring that the employer agree to a check-off clause. In *Porter*, the union was not entitled to a check-off clause unless the employer agreed to provide it in the collective bargaining agreement. Here, however, as we have shown, the Hospital's disparate treatment of the unit employees would have been unlawful even if there had been

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[3]The Hospital's reliance (Pet. 13) on *B.F. Goodrich Co.*, 195 N.L.R.B. 914, 915 (1972), and *Production Molded Plastics, Inc.*, 227 N.L.R.B. 776 (1977), enforced, 604 F. 2d 451 (6th Cir. 1979), is misplaced. In *Production Molded Plastics*, the Board explained that it does not necessarily follow that a layoff is discriminatory merely because an employer unlawfully refused to bargain about it. Rather, because the refusal to bargain may be unlawful for reasons other than antiunion motivation, such motivation must be established independently in order to prove a Section 8(a)(3) violation. Similarly, in *B.F. Goodrich*, the Board held that, where no evidence was adduced showing a discriminatory intent in withholding benefits from unit employees, no violation of Section 8(a)(3) was established. In the present case, the record supports the Board's finding of discriminatory intent.

no request by the Union for bargaining. In these circumstances, the employees' right to be made whole exists apart from any agreement that the Hospital and the Union would have reached.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Reply Brief for Petitioner.

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February 17, 1981

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Reply Brief for Petitioner.

In its Brief in Opposition respondent argues, for the first time, that petitioner's alleged violation of § 8(a)(3) of the National Labor Relations Act was based upon its spokesmen's statements at the bargaining table, rather than upon petitioner's contemporaneous refusal to bargain in good faith (Br. in Opp. 5). Neither the Board nor the Court of Appeals so ruled. The Board concluded that petitioner's unlawful motivation was demonstrated by the same evidence that established petitioner's refusal to bargain in good faith (Pet. App. 59a-60a, 64a-66a). Similarly, the Court of Appeals upheld the finding

of unlawful motivation on the basis of petitioner's "piecemeal bargaining strategy": in other words, "its bad faith refusal to make a wage and benefits counterproposal" (Pet. App. 12a-13a). Respondent also puts forth the novel theory that the Board would have reached the same § 8(a)(3) conclusion even in the absence of bargaining (Br. in Opp. 5). However, neither the Board nor the Court below relied upon this theory. Accordingly, to the extent respondent raises arguments for the first time in this Court, they should not be accepted. *NLRB* v. *Metropolitan Life Insurance Co.*, 380 U.S. 438, 444 (1965).

Because respondent concludes erroneously that the bargaining context in which this case occurred is irrelevant to the Board's § 8(a)(3) determination, it contends that *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970), does not proscribe the Board's make whole order in this case (Br. in Opp. 6-7). However, the findings below, when read properly, clearly show that this case raises fundamental questions about the meaning of § 8(d) and this Court's decision in *H.K. Porter*.

For the reasons set forth above and in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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